Supreme Court, U.S.
FILED

041363 APR 4 2005

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

UNITED STATES OF AMERICA ex rel.
JACK J. GRYNBERG,

Petitioner,

v.

PRAXAIR, INC. and NIELSON & ASSOCIATES, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

PHILLIP D. BARBER, ESQ.
Counsel of Record
1675 Larimer Street,
Ste. 620
Denver, CO 80202
(303) 894-0880

MICHAEL S. PORTER, ESQ.
4465 Kipling Street
Wheat Ridge, CO 80033

EDWARD A. DAUER, ESQ.
2255 East Evans Avenue
Denver, CO 80208

Attorneys for the Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the jurisdictional bar of 31 U.S.C. §3730(e)(4)(A) applies when the Relator's complaint is drawn from sources or information which are not listed in 31 U.S.C. §3730(e)(4) and which themselves do not disclose the fraud or all of its essential elements?

2. Whether the jurisdictional bar of 31 U.S.C. §3730(e)(4)(A) applies when the Relator's complaint is supported by public information, but is not "based upon" the sources listed in the statute?

3. Whether a Relator may be an "original source" under 31 U.S.C. §3730(e)(4)(B) even if he has not witnessed the fraud with his own eyes?

4. Whether a court that lacks subject matter jurisdiction under the False Claims Act has subject matter jurisdiction to award attorneys fees under the 31 U.S.C. §3730(d)(4)?

5. Whether a defendant who succeeds in having a Relator's complaint dismissed for lack of subject matter jurisdiction is a "prevailing party" for purposes of 31 U.S.C. §3730(d)(4)?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT	1
STATUTES INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
I. FACTUAL BACKGROUND	2
A. The 1983 Agreement	2
B. Government Involvement	3
C. Grynberg's Investigation	5
II. PROCEDURAL BACKGROUND	7
ARGUMENT	9
I. A RELATOR'S COMPLAINT IS NOT BARRED BY PUBLIC DISCLOSURES OF INFORMATION UNLESS THE DISCLOSURE SOURCE IS PROHIBITED BY THE FCA AND IT ALSO DESCRIBES ALL OF THE ESSENTIAL ELEMENTS OF THE FRAUD	9
II. A RELATOR'S COMPLAINT IS NOT BARRED UNLESS IT IS "BASED UPON" INFORMATION DISCLOSED THROUGH THE SOURCES LISTED IN THE STATUTE	16
III. A RELATOR MAY BE AN ORIGINAL SOURCE EVEN IF HE HAS NOT WITNESSED THE FRAUD "WITH HIS OWN EYES"	19
IV. A COURT DOES NOT HAVE AUTHORITY TO AWARD STATUTORY ATTORNEYS FEES UNDER THE FCA WHEN IT LACKS SUBJECT MATTER JURISDICTION	23

TABLE OF CONTENTS – Continued

Page

V. A PARTY WHO SUCCEEDS IN HAVING A FCA CASE DISMISSED SHOULD NOT BE DEEMED A PREVAILING PARTY FOR PURPOSES OF THE FEE-SHIFTING PROVISION OF THE FCA 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

A-1 Ambulance Service, Inc. v. California, 202 F.3d 1238 (9th Cir. 2000) 13

Ass'n for Retarded Citizens v. Thorne, 68 F.3d 547 (2nd Cir. 1995) 25

Branson v. Nott, 62 F.3d 287 (9th Cir.), *cert. denied*, 516 U.S. 1009 (1995) 24, 27

Chambers v. NASCO, 501 U.S. 32 (1991) 23

Citizens for a Better Environment v. Steel Co., 230 F.3d 923 (7th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001) 23, 24

Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562 (11th Cir. 1994) 21

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 23

Dingle v. Bioport Corp., 388 F.3d 209 (6th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 2809 (U.S. Mar. 28, 2005) 17

Eberhardt v. Integrated Design & Construction Inc., 167 F.3d 861 (4th Cir. 1999) 15

Farrar v. Hobby, 506 U.S. 103 (1992) 26

Finn v. United States, 856 F.2d 606 (4th Cir. 1988) 28

Hanrahan v. Hampton, 446 U.S. 754 (1980) 27

Hewitt v. Helms, 482 U.S. 755 (1987) 27

Horner v. Kentucky High Sch. Ath. Ass'n, 206 F.3d 685 (6th Cir. 2000) 27

Jackson v. Chater, 94 F.3d 274 (7th Cir. 1996) 28

TABLE OF AUTHORITIES – Continued

Page

Keene Corp. v. Cass, 908 F.2d 293 (8th Cir. 1990) ... 25, 27, 28

Kennard v. Comstock Resources, Inc., 363 F.3d 1039 (10th Cir. 2004) ... 11

Miles v. California, 320 F.3d 986 (9th Cir. 2003) ... 27

Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782 (1989) ... 27

United States ex rel. Burns v. A.D. Roe Co., 186 F.3d 717 (6th Cir. 1999) ... 15

United States ex rel. Devlin v. California, 84 F.3d 358 (9th Cir.), *cert. denied*, 519 U.S. 949 (1996) ... 20

United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13 (2nd Cir. 1990) ... 14

United States ex rel. Dunleavy v. County of Delaware, 123 F.3d 734 (3rd Cir. 1997) ... 13, 14, 15

United States ex rel. Feingold v. Adminastar Fed., Inc., 324 F.3d 492 (7th Cir. 2003) ... 15, 18

United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997) ... 9, 22

United States ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir. 1996) ... 20

United States ex rel. Grynberg v. Praxair, Inc., 207 F.Supp.2d 1163 (D.Colo. 2001) ... 1, 7

United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038 (10th Cir. 2004) ... *passim*

United States ex rel. Laird v. Lockheed Martin, 336 F.3d 346 (5th Cir. 2003) ... 20

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Lamers v. City of Green Bay, 998 F.Supp. 971 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999) 20, 21

United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402 (9th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996) 15

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 10

United States ex rel. Merena v. Smithkline Beecham Corp. 114 F.Supp.2d 352 (E.D. Pa. 2000) 9

United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp., 276 F.3d 1032 (8th Cir.), *cert. denied*, 537 U.S. 944 (2002) 22

United States ex rel. Mistick PBT v. Housing Authority, 186 F.3d 376 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000) 18

United States ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993) 17, 18

United States ex rel. Rabushka v. Crane Co., 40 F.3d 1509 (8th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) 15, 18

United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514 (10th Cir. 1996) 13

United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) 18

United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994) 14, 17, 21, 22

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991) 13, 15

United States ex rel. Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984) 11

United States v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999) 17, 18, 22

United States v. New York City Health & Hospital Corp., 2000 U.S. Dist. LEXIS 15677 (S.D.N.Y. 2000), *aff'd sub nom., United States v. New York Med. College*, 252 F.3d 118 (2nd Cir. 2001) 25

W.G. ex rel. D.G. v. Senatore, 18 F.3d 60 (2nd Cir. 1994) 25

Willy v. Coastal Corp., 503 U.S. 131 (1992) 23

FEDERAL STATUTES:

20 U.S.C. §1415(e)(4) 25

28 U.S.C. §1254(1) 1

28 U.S.C. §1331 2

28 U.S.C. §1332 2

28 U.S.C. §2412(d) 28

31 U.S.C. §3729 *et seq.* 1, 7

31 U.S.C. §3729(a)(7) 7

31 U.S.C. §3730(d)(4) 7, 8, 23, 25, 26

31 U.S.C. §3730(e)(4) 10, 11, 13, 14, 17

31 U.S.C. §3730(e)(4)(A) 15, 16

31 U.S.C. §3730(e)(4)(B) 12, 19

TABLE OF AUTHORITIES – Continued

Page

31 U.S.C. §3732(a) 2

42 U.S.C. §11046(a)(1) 23

42 U.S.C. §11046(f) 24

42 U.S.C. §1973l(e) 27

42 U.S.C. §1983 ..... 24, 27

42 U.S.C. §1988 ..... 24, 27

42 U.S.C. §1988(b) 24

42 U.S.C. §2000e5(k) 27

FEDERAL RULES:

F.R.Civ.P. 11 23

Supreme Ct.R. 10(c) 23

OTHER AUTHORITIES:

J. Boese, Civil False Claims and Qui Tam Actions 2d (Supp. 2005) at 9-84.9 10

J. Helmer, False Claims Act: Whistleblower Litigation 3d (2002) at 235 10

S. Rep. 99-345, reprinted at 1986 U.S.C.C.A.N. at 5267-5271 11

TABLE OF APPENDICES

		Page
Appendix A	Opinion of the United States Court of Appeals for the Tenth Circuit Dated and Filed November 15, 2004	1a
Appendix B	Order of the United States District Court for the District of Colorado Dated and Filed June 6, 2001	41a
Appendix C	Order of the United States District Court for the District of Colorado Dated and Filed April 13, 2001	44a
Appendix D	Judgment of the United States District Court for the District of Colorado Dated and Filed April 13, 2001	46a
Appendix E	Order and Judgment of the United States District Court for the District of Colorado Dated and Filed March 28, 2001	48a
Appendix F	Judgment of the United States District Court for the District of Colorado Dated and Filed March 28, 2001	97a
Appendix G	Order of the United States Court of Appeals for the Tenth Circuit Dated and Filed January 5, 2005	99a
Appendix H	31 U.S.C. §3729 False claims	101a
Appendix I	31 U.S.C. §3730 Civil actions for false claims	104a
Appendix J	April 4, 1985 Letter from MMS to Conoco, Inc.	112a

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported as *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004). The decision of the United States District Court for the District of Colorado is reported as *United States ex rel. Grynberg v. Praxair, Inc.*, 207 F.Supp.2d 1163 (D.Colo. 2001).

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

(i) Petitioner seeks review of the Judgment of the United States Court of Appeals for the Tenth Circuit that was entered on November 15, 2004; (ii) Petitioner filed a Petition for Rehearing, which was denied by the Tenth Circuit on January 5, 2005; (iii) This Court has jurisdiction pursuant to 28 U.S.C. §1254(1); (iv) The notification required by Rule 29.4(b) or (c) is not applicable to this petition.

STATUTES INVOLVED IN THE CASE

This case involves the False Claims Act, 31 U.S.C. §3729, *et seq.* ("FCA"), the pertinent provisions of which are reproduced in the Appendix that is filed with this petition.

STATEMENT OF THE CASE

A review of a judgment of a United States court of appeals is sought by Petitioner. The basis for federal jurisdiction in the court of first instance was 28 U.S.C. §1331, 28 U.S.C. §1332, and 31 U.S.C. §3732(a).

I. FACTUAL BACKGROUND

Respondent Nielson & Associates, Inc. ("Nielson") is a privately-held Wyoming corporation that produces and sells oil, hydrocarbon liquids and carbon dioxide gas ("CO_2") from the McCallum and South McCallum fields in northern Colorado under leases issued by the United States. Respondent Praxair, Inc. ("Praxair") owns and operates an industrial plant designed to purify and convert Nielson's raw CO_2 into liquid suitable for beverages, food processing and other uses. The dispute below centered on the measurement and valuation of the CO_2 that was produced for purposes of paying royalties to the United States.

A. The 1983 Agreement

The leases from which Nielson extracts CO_2 were originally between Conoco and the United States. For many years, Conoco produced and sold oil from the leases. CO_2 was a byproduct that was vented to the atmosphere.[1]

The right to vent CO_2 changed because of an "Agreement for the Sale of Carbon Dioxide" ("Agreement") executed in June, 1983 between Conoco and Liquid Carbonic

[1] The venting of CO_2 during the early periods of the leases is not challenged in this action.

Corporation ("Liquid Carbonic"). Nielson is the successor to Conoco and Praxair is the successor to Liquid Carbonic. The Agreement, which remains unchanged from the 1983 version in all relevant aspects, provided that Praxair would return 80% of all "vent gases" produced from its processing plant to Nielson to reinject into the subsurface formations. Nielson was to provide the pipeline to permit the return of those gases, and was obligated to pay all royalties due on the CO_2 that Praxair purchased.

Grynberg's complaint alleged that Nielson and Praxair had agreed between themselves to underreport the volume and undervalue the CO_2. The complaint alleged that Praxair used approximately 30% of the CO_2 for processing without Nielson or Praxair paying royalties on it, and that the reports which Nielson and Praxair filed or caused to be filed misstated the amount and value of CO_2 production. This resulted in an underpayment of royalties to the United States.

B. Government Involvement

On October 22, 1984, Conoco sent a copy of the Agreement to the Minerals Management Service ("MMS") and asked the MMS to approve its terms. Conoco explained it would supply the raw CO_2 for processing and receive payment based on the price of the finished product shipped from Liquid Carbonic's plant (the plant "tailgate"). Conoco also described the plan to return and reinject vent gases into one of its wells.

The MMS expressed its concern that measurement at the tailgate, as opposed to measurement at the wellhead, would understate the actual amount of production. In a letter dated March 14, 1985, the MMS wrote, "[I]f royalty

is to be paid on the volume of gas leaving the plant, there could be significant differences, due to plant losses, from the volumes the [wellhead] allocation meters indicate." Conoco responded that the plant's vent gas losses would diminish once operations stabilized, and reiterated its plan to reinject some of the gas.

On April 4, 1985, the MMS directed that royalties must never be based "upon less than the gross proceeds accruing to Conoco from the sale of the CO_2", and it prohibited the deduction of processing allowances by Liquid Carbonic (and later Praxair) from the gross proceeds of the sale (the "April 1985 letter"). Additionally, the MMS advised Conoco to secure approval of its "production reporting sequence" from the Bureau of Land Management ("BLM").

The venting of the CO_2 triggered further scrutiny in November 1985. The MMS informed the BLM that the reporting forms for "the production months October 1984 through August 1985 indicated the majority of CO_2 production [was] being vented."

In 1992, Liquid Carbonic sought the BLM's permission to construct a dry ice manufacturing facility at its plant. The request indicated that the CO_2 vapor released from the dry ice machinery would be recycled back into the main CO_2 plant. The plan to recycle the CO_2 was later abandoned without explanation.

In 1996, the MMS and BLM again inquired about Nielson's royalty calculation and reporting practices. On August 22, 1996, the MMS issued to Conoco and Nielson an "Order to Comply", citing 30 C.F.R. §206.154, which charged Conoco and Nielson with having incorrectly reported production and royalties from the South

McCallum wells. The order stated that "because of [the] unauthorized measurement point being at the tailgate of the CO_2 plant, royalty bearing volumes are not being accounted for." Nielson appealed the order. A meeting followed between representatives of BLM, Praxair, Nielson, Conoco, and Ed Calvert, who represented companies that were Nielson's partners. At the meeting, the BLM representatives suggested that Nielson seek BLM approval for plant tailgate measurement for both McCallum and South McCallum CO_2 production, retroactive to November 28, 1988, which Nielson did.[2]

C. Grynberg's Investigation

Petitioner Jack J. Grynberg is a petroleum engineer who is the president and co-owner of Grynberg Petroleum Company in Denver, Colorado. In 1997, Grynberg was researching how to acquire a liquid CO_2 supply to inject into an oil field to increase recovery. He telephoned Nielson's president, Jim Nielson, who complained that Praxair was taking 30% of the CO_2 and was using it as part of its processing operation, without paying for it. This statement motivated Grynberg to conduct an investigation into the situation, which included a subsequent conversation with Jim Williams, Nielson's chief operations officer, regarding the pricing arrangements between Nielson and Praxair.

As part of his prefiling investigation, the Petitioner submitted a Freedom of Information Act ("FOIA") request, for the Agreement and other materials. All that he received

[2] The response to Petitioner's FOIA request did not include this information.

was a redacted copy of two (of the seven) pages of the April 1985 letter, (attached as pages 112a-115a to Petitioner's Appendix), which did not indicate the BLM had approved the Agreement's procedures. The April 1985 letter stressed that Nielson and Praxair were to reinject all unused CO_2 back into the formations; however, the piping necessary to return and reinject the gas into its well was never installed and all CO_2 that was not sold to Liquid Carbonic (and later to Praxair) was vented.

Unable to obtain a copy of the Agreement, Grynberg sent an associate to research the records at the Colorado Oil and Gas Conservation Commission ("COGCC") in order to determine the amount of CO_2 production and taxes that Nielson had reported. With this information, he was able to calculate the amount that Nielson had been paid by Praxair for the CO_2, as well as the amount of royalties paid by Nielson to the United States. He compared the price that Praxair paid to the reasonable market value of the CO_2 by making phone calls to end users, and concluded that the price was approximately 10% of the market price.

Grynberg also directed one of his employees to take photographs of the Praxair plant from the public county roads, which revealed that CO_2 was being vented by Praxair. His efforts culminated in the conclusion that the volumes reported on Nielson's MMS Forms 2014 and 3160 were fraudulent and did not reflect the actual CO_2 production from the McCallum Fields, and that the price Praxair paid for the CO_2 was intentionally undervalued based upon the Agreement.

II. PROCEDURAL BACKGROUND

Grynberg filed a *qui tam* action under the FCA, 31 U.S.C. §§3729 *et seq.*, against Nielson and Praxair on January 7, 1998, claiming the defendants were liable under the so-called "reverse false claims" provision of the FCA, 31 U.S.C. §3729(a)(7), for having made or caused to be made false valuations of royalties owed to the Government for carbon dioxide (CO_2) production. *See United States ex rel. Grynberg v. Praxair, Inc.*, 207 F.Supp.2d 1163 (D.Colo. 2001). Although Nielson submitted the monthly production and royalty statements to the United States, Grynberg asserted that Praxair was also culpable under the FCA because it knowingly participated in the fraud and caused the submission of false statements through its participation.

Nielson and Praxair filed separate motions for summary judgment.[3] The district court granted summary judgment on the grounds that: 1) there was no evidence to suggest "knowingly false" statements had been made to the government; 2) the court did have subject matter jurisdiction because the *qui tam* action was based on publicly disclosed allegations or transactions; and 3) the claims were known to the United States prior to 1986. The district court ordered Grynberg to pay costs, but left each party to bear its own attorneys fees. Praxair and Nielson sought reconsideration, maintaining that Grynberg's lawsuit was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment" under 31 U.S.C. §3730(d)(4), which the district court denied. Grynberg

[3] The district court had previously denied each defendant's motions to dismiss the Amended Complaint.

appealed the dismissal of his claim and Praxair, but not Nielson, cross-appealed the denial of its request for attorney fees and expenses.

The Tenth Circuit affirmed the district court's conclusion that Grynberg failed to establish subject matter jurisdiction. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004) ("*Praxair*"). It ruled that the mismeasurement and underpayment transactions on which Grynberg's allegations were based were publicly disclosed twice: first, when the MMS sent its response to Grynberg's FOIA request and second, at the 1996 meeting to discuss the Order to Comply, where the substance of the administrative investigation was "publicly disclosed" to Ed Calvert. The court did not reach the remainder of the issues presented in Grynberg's appeal.

The Tenth Circuit reversed the denial of attorneys fees to Praxair and remanded. It ruled that Praxair was the "prevailing party" in the case and, although the district court did not have subject matter jurisdiction over the FCA claims, concluded that it did have jurisdiction to award attorneys fees under the fee-shifting provision of §3730(d)(4).

Grynberg now requests that this Court grant certiorari to review the ruling of the Tenth Circuit Court of Appeals, which misinterprets the FCA and is in conflict with the decisions in other circuits.

ARGUMENT

I. A Relator's Complaint Is Not Barred by Public Disclosures of Information Unless the Disclosure Source Is Prohibited by the FCA and it Also Describes All of the Essential Elements of the Fraud.

The court of appeal's decision on the meaning of "public disclosure" under the FCA furthers the deep conflicts among the circuits – conflicts which have persisted for years and which will not be resolved without the attention of this Court. As one district court prophetically wrote:

> There seems to be no unanimity both among and within individual circuits as to when claims are 'based upon' public disclosures, what constitutes a public disclosure, . . . what are the requisites to be classified as an 'original source,' when a claim is 'primarily based upon' prior public disclosures and many other issues that arise under the statute.

United States ex rel. Merena v. Smithkline Beecham Corp., 114 F.Supp.2d 352, 371-372 (E.D. Pa. 2000).

The *qui tam* provisions of the FCA are themselves not entirely clear, having been crafted to balance two very different policy objectives.[4] Interpretations in the case law of the circuits has shown increasing variability since the

---

[4] "Virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing, however: the language of the statute is not so plain as to clearly describe which cases Congress intended to bar." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C.Cir.), *cert. denied*, 522 U.S. 865 (1997).

FCA was amended in 1986,[5] which is a source of difficulty for the courts and litigants alike.[6] The conflicts create incentives for forum shopping, and disincentives for the very actions Congress most sought to encourage. This case implicates the deepest and most frequently litigated of these divisions.[7]

The "Public Disclosure" Provisions of the FCA. The history of the FCA is significant. Until 1943 a *qui tam* relator could bring a claim even if its allegations were simply copied from a public criminal complaint. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In 1943 Congress reacted to such "parasitic" relators by adding the "government knowledge" bar: if a relator's claim was based on information already in the government's possession, the *qui tam* case was barred. This, however, proved unsatisfactory in the other extreme: a relator who had *itself* previously provided the government with information about the fraud was equally barred, simply because the

---

[5] "There are at least three different approaches to 'public disclosure' and four distinct analyses to 'original source' on the part of Courts of Appeal." J. Helmer, False Claims Act: Whistleblower Litigation 3d (2002) at 235.

[6] " . . . neither potential *qui tam* litigants nor defendants can make any knowledgeable prediction as to whether or not jurisdiction will be found in a case involving possibly public documents or information." J. Boese, Civil False Claims and Qui Tam Actions 2d (Supp. 2005) at 9-84.9. "Section 3730(e)(4) clearly requires additional clarification and the circuit splits are becoming more obvious." *Id.* at 4-104.8.

[7] The issues arising under §3730(e)(4) are "the most frequently litigated issues" in FCA *qui tam* actions. Boese, *supra* at ¶¶4-43 and 4-89.

information was in the government's possession when the relator's action was filed.[8]

Concerned that *qui tam* actions had declined unacceptably, Congress amended the FCA again in 1986.[9] The "government knowledge" defense was removed, the rights of *qui tam* relators were expanded, and the problem of the "parasitic" relator was addressed by the current §3730(e)(4):

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information . . .

Many circuits apply this section by asking, in order, four questions: (1) whether the alleged "public disclosure" contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made "public" within the meaning of the FCA; (3) whether the relator's complaint is "based upon" this public disclosure; and, if so, (4) whether the relator qualifies as an "original source." *See, e.g., Kennard v. Comstock Resources*, 363 F.3d 1039, 1042 (10th Cir. 2004). If all of the first three questions are answered "yes", the court next asks whether the

---

[8] The signal case was *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

[9] *See* S. Rep. 99-345, reprinted at 1986 U.S.C.C.A.N. at 5267-5271.

relator was an "original source" of the information, which means "an individual who has direct and independent knowledge of the information on which the allegations are based . . . " §3730(e)(4)(B)

In this case the court of appeals held that the redacted two-page letter provided in response to a FOIA request, taken together with other "publicly available" information, was a "public disclosure" (the court did not analyze the meeting with Calvert, who was associated with defendant Nielson's partner); that Grynberg's complaint was based upon the public disclosure because it was "substantially identical" to what was "in the public domain"; and that because Grynberg's knowledge of the information underlying his allegations was not direct and independent, he was not an original source and his *qui tam* action was barred. The legal principles on which the Tenth Circuit based these conclusions are both contrary to the statute and inconsistent with authority in other federal circuits.

The Tenth Circuit's concept of "public domain" goes beyond what the FCA lists as the prohibited sources of public disclosure. The only listed source from the FCA that the court identified was the April 1985 letter that was produced in response to the FOIA request. Those two pages, found at Appendix 112a-115a, reflect only some parts of the Agreement between Nielson's predecessor and Praxair's predecessor, namely: that Liquid Carbonic owned the processing plant on the property; that Conoco retained title to the gas until the plant tailgate; that the price for the CO_2 was adjusted to reflect variations in Liquid Carbonic's own sales prices; and that gas remained after processing would be returned to the formation rather than vented.

The facts in the April 1985 letter do not describe a fraud. There is no fraud in a purchaser owning a processing plant on the seller's property; in a seller holding title to the gas until the tailgate; or in making adjustments to the price to reflect market conditions, *so long as the price reported is the fair market value of the marketable product or the "grossed up" contract price.*[10] There is also no fraud in returning unused gas to the formation. The FOIA document gave no hint of fraud, because the sale price was redacted from the document, the failure to gross up the price was invisible, and the fact that gas was vented was contrary to what the FOIA document itself said, ("[T]he remaining gas will be compressed and reinjected").

Grynberg researched and determined the volumes produced and the price paid by Praxair from the tax records of the COGCC. Even if "publicly available", these state records are not among the sources listed in §3730(e)(4).[11] Grynberg found the market price for CO_2 from his own investigation, information which was not from a listed source. He learned about actual wellhead volumes from a private well service, also not a listed source. His information about venting came from his own investigation, including photographs taken from a "public

---

[10] "Grossed up" refers to the need to determine the value of processing deductions which served to lower the price paid by Praxair for the CO_2, and then to add that value to the price in the Agreement, as required by federal regulations.

[11] In other circuits only federal administrative proceedings are "public disclosures." *Compare: United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3rd Cir. 1997); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 (11th Cir. 1991); with *A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000); and *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996).

road", which also was not from a listed source. Nonetheless, the Tenth Circuit recited the information Grynberg gleaned from each of these non-listed sources and held that " . . . *all* of the elemental aspects of the allegedly fraudulent transaction" were in the "public domain", thus triggering the jurisdictional bar. *Praxair* at 1050.

Nothing in the statute endorses the Tenth Circuit's concept of "public domain". The phrase entered the jurisprudence of the FCA from a phrase in *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 653 (D.C. Cir. 1994),[12] which itself took pains to say that the bar is triggered only if disclosures from *statutory sources* which place *all* of the necessary elements of the fraud in the public domain. The Tenth Circuit replaced the statutory list with the much broader concept of "public domain", a significant departure from the language in the statute.

Praxair's "public domain" test is also inconsistent with the law in other circuits. The D.C. Circuit in *Springfield*, for example, while using the phrase "public domain," *Springfield* at 654, was quite clear that when the disclosures from the listed sources alone provide only innocuous information, and do not by themselves portray the conduct as fraudulent, there is no public disclosure to bar the action. Similarly, in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 741 (3rd Cir. 1997), the documents at issue, like the FOIA production here, disclosed a transaction but not that it was fraudulent. An additional document did disclose the remaining essential

[12] One earlier mention of "public domain" in connection with section 3730(e)(4) has been found: *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2nd Cir. 1990). *Dick*, however, is seldom cited, while *Springfield* is often invoked for its use of the phrase.

element of fraud. However, the Third Circuit ruled that because the additional document was not within the statutory list, and because the list is "an exhaustive rendition of the possible sources," *Id.* at 744, information from the additional document could not contribute to a statutory "public disclosure".[13]

The Eleventh Circuit followed the same reasoning in *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991), finding that the statutory list is exclusive *and* that the bar applies only if the complaint is based on information disclosed by those sources. The Sixth Circuit agreed in *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 724-725 (6th Cir. 1999), as did the Seventh Circuit in *United States ex rel. Feingold v. Adminastar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003). In *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509 (8th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995), the Eighth Circuit held that information from public corporate reports was "insufficient as a jurisdictional bar" because §3730(e)(4)(A) "does not deny jurisdiction over actions based on disclosures other than those specified [in the statute]," 40 F.3d at 1514 n.2, (citations omitted), *and* that information from listed sources does not erect the bar if it merely describes transactions, however troubled, unless the disclosed information itself gives rise to an "inference of fraud". *Id.* at 1513.

---

[13] In accord, *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1410 (9th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996), also holding that the public disclosures must establish the fraud, and refusing to include in that calculation information from documents that do not satisfy the statutory definition. *See*, to the same effect, *Eberhardt v. Integrated Design & Construction Inc.*, 167 F.3d 861, 864 (4th Cir. 1999).

To trigger the "public disclosure" bar, *all* of the essential elements of the fraud must have been disclosed by *only* the listed sources. In other circuits Grynberg's claims in *Praxair* would not have been barred – the essence of a conflict among the circuits.

II. A Relator's Complaint Is Not Barred Unless it Is "Based Upon" Information Disclosed Through the Sources Listed in the Statute.

If there has been a public disclosure, the next question is whether the relator's complaint was "based upon" it. By definition, the only publicly disclosed information against which to compare the complaint is that disclosed from the sources listed in §3730(e)(4)(A). If the complaint is compared instead with all information that is in the "public domain", even if not disclosed by a listed source, then the limitations of the public disclosure rule become a nullity. That, however, is what the court in *Praxair* did.

The "based upon" analysis in *Praxair* occupies two paragraphs. *Praxair* at 1051-1052. At page 1052 the court says that "the crux of Grynberg's complaint . . . is that value and production are underreported. The underreporting is caused by the venting of gas . . . " The court then concludes that "Grynberg's complaint is based on a publicly disclosed transaction." *Id.* The court had also held that the only document necessary to consider as a public disclosure was the FOIA production. Yet, the FOIA production does not disclose the venting of gas. To the contrary, the FOIA production says, "Any vent gases left over will be returned . . . compressed and reinjected." There is absolutely nothing in the FOIA production that tells the true state of facts. Those facts were developed by Gynberg's own investigation. Here the court covered the gap by

comparing the complaint with information available in the broader "public domain". The broader "public domain" test would re-enact the government knowledge defense, which Congress' intended to repeal.[14]

Praxair rests on deep divides among the circuits. In the Tenth Circuit, the "based upon" issue is not taken seriously. For example, *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552-553 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), the court held that because "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction . . . the threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis." *Praxair* was rooted in this principle. *Praxair*, at 1051.

The Seventh Circuit, however, begins with the opposite premise: "[T]he jurisdictional bar is not to be excessively narrowly construed. The provision [§3730(e)(4)] is therefore to be understood in the context of the 1986 amendments, which, as explained, broaden the *qui tam* provisions, increasing incentives for the exposure of fraud." *United States v. Bank of Farmington*, 166 F.3d 853, 858 (7th Cir. 1999). The D.C. Circuit expressed the same principle in an opinion addressing the "public disclosure" question. *Springfield* at 567.

---

[14] Some courts would do exactly this. *See, e.g., Dingle v. Bioport Corp.*, 388 F.3d 209, 215 (6th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 2809 (U.S. Mar. 28, 2005), suggesting that once enough information is "in the public domain" to "set the government on the trail of the fraud," no *qui tam* action is necessary and thus the action should be barred.

This difference in starting points leads to important practical differences. In the Tenth Circuit, "based upon" means "supported by". Thus, in the Tenth Circuit a complaint is barred if it is "based in *any* part upon publicly disclosed allegations or transactions", even if they are not disclosed in the listed sources. *Precision*, at 553. Other circuits in accord with this approach include the Third (*United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376, 388 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000)), and the Eighth *Rabushka, supra*.

An opposite interpretation that takes "based upon" to mean "derived from" has been accepted in other circuits. *See, e.g., United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994); *Bank of Farmington*, 166 F.3d at 863; and *Feingold*, at 497. That difference requires that the relator's complaint must *intentionally* use the public source. The distinction matters a great deal when a relator's complaint is similar to the publicly disclosed allegations or transactions, but the relator was unaware of those disclosures at the time the complaint was filed. In such cases, to say "supported by" is to bar the relator; whereas to say "derived from" is not to bar the relator. *See Siller*, 21 F.3d at 1348. ("[I]t is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.")

The Tenth Circuit holds the opposite. A "substantial identity" between the allegations in the complaint and publicly disclosed information is by itself enough to bar the action. This view reached new heights in *Praxair*, when the court applied the "based upon" test by comparing the relator's complaint not just to information revealed by

the listed sources, but to information available in the much broader "public domain." Had *Praxair* been filed in another circuit, the outcome on this issue too could have been the opposite of what it was.

III. A Relator May Be an Original Source Even If He Has Not Witnessed the Fraud "With His Own Eyes".

If there has been a public disclosure from a listed source, if that disclosure included all of the essential elements of the fraud, and if the *qui tam* action is based upon that disclosure, a relator is still not barred if he "has direct and independent knowledge of the information on which the allegations are based . . . " 31 U.S.C. §3730(e)(4)(B)

In this case the FOIA production described only a part of the Nielson-Praxair transaction. Grynberg's complaint rested on other essential information which he, alone uncovered: 1) information relayed to Grynberg by an officer of Nielson, stating that Praxair's production reflected a 30% difference between inlet and outlet volumes; 2) information obtained for Grynberg from a state agency about the volume and the price Nielson had been reporting; 3) wellhead volume data received by Grynberg from a private reporting service; 4) venting discovered by direct observations and recorded in photographs taken from a public road; and 5) Grynberg's personal observations and telephone inquiries about the fair market value of CO_2 gas. *Praxair* at 1046-1047.

The *Praxair* court brought two principles of Tenth Circuit law to bear: First, the relator's information must be "marked by the absence of any intervening agency and unmediated by anything but his own labor." *Praxair* at

1052-1053. Second, while not erecting a *per se* prohibition against a relator relying on "public records", a relator cannot be an original source when his information is based solely on "material elements [of the fraud] already in the public domain." *Praxair* at 1054. These views are at odds with holdings in many circuits.

"Secondhand" Information. According to the Tenth Circuit, the information Grynberg received from Nielson was "secondhand" and not "direct" because Grynberg "did not see the fraud with his own eyes or obtain his knowledge of it through his own labor unmediated by anything else." *Praxair* at 1054.[15] The court thus refused to count as "direct" any information a relator hears from any other person. That position is in conflict with the law in other circuits.[16]

In *United States ex rel. Laird v. Lockheed Martin*, 336 F.3d 346, 349 (5th Cir. 2003), the relator "became aware (through his supervisor, Ben Carroll) that Lockheed was knowingly failing to report excessive costs." The Fifth Circuit nevertheless remanded the case for further findings on whether the relator was an "original source". In *United States ex rel. Lamers v. City of Green* Bay, 998

[15] The *Praxair* opinion is in this regard consistent with other Tenth Circuit authority. *See, e.g., United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1007 (10th Cir. 1996) (the relator in *Fine* was not *the very person* who first saw the figures that indicated a fraud, thus leading the Tenth Circuit to deny him relator status).

[16] Although the Ninth Circuit appears superficially to be in accord, its position is distinguishable. In *United States ex rel. Devlin v. California*, 84 F.3d 358, 360 (9th Cir.), *cert. denied*, 519 U.S. 949 (1996), the relator's knowledge was not "first hand" because his informer told him *that there had been a fraud*, not just the facts from which, as Grynberg did in *Praxair*, the conclusion of fraud could be deduced.

F.Supp. 971, 983 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999), the relator collected information about the defendants' bus routes through his employees' and agents' investigations, yet the Seventh Circuit held him to be an original source of that information, *Lamers*, 168 F.3d at 1018. In *Springfield* the relator conducted "interviews with individuals and businesses" about the whereabouts of the defendant on dates he had billed for his services elsewhere. The D.C. Circuit nevertheless had no difficulty qualifying the relator as an original source. *Springfield* at 657.[17]

The law in these other circuits, contrary to that in *Praxair*, is compelling. The paradigmatic FCA whistleblower is an insider who learns, for example, of billing practices from people in the defendant's billing department; of the qualities of the goods from people in the shipping department; of the contract specifications from people in the contracting department. Every element of the fraud comes from other people. To deny original source status to such a person because they "did not see the fraud with their own eyes", is to choke off the very actions Congress sought to encourage.

Information "Already in the Public Domain". The *Praxair* court also held that Grynberg's additional information was not "independent," because it was taken from public records or was otherwise publicly available – pictures taken from a public road, information from a private reporting service and from the COGCC records,

---

[17] *See*, in addition, *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 568 (11th Cir. 1994) (relator had interviewed, among others, people at the agency responsible for the program being defrauded – held, relator was an original source).

and telephone calls gathering "common" pricing information. *Praxair* at 1053-1054.

In other circuits "independent" does not mean "not in the public domain", as it does in the Tenth Circuit. In the Fourth Circuit "independent" means independent of the public disclosure. *Bank of Farmington*, 166 F.3d at 864. The Eighth Circuit likewise defines "independent" to mean "knowledge not derived from the public disclosure", and has expressly distanced itself from the Tenth Circuit's position. *See United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1048 (8th Cir.), *cert. denied*, 537 U.S. 944 (2002).[18] The same rule applies in the D.C. Circuit: "In order to be 'independent,' the information known by the relator cannot depend or rely on the *public disclosures*". *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997), citing *Springfield* (emphasis supplied.) In other circuits, Grynberg would have been an "original source" and this suit would not have been barred.

As the preceding analysis shows, the opinion of the Tenth Circuit in *Praxair* offers an opportunity for this Court to resolve many of the most significant questions arising under the FCA – questions about which the several circuits are deeply in conflict. Absent an authoritative decision from this Court, it is unlikely that these profoundly differing readings will coalesce into any common understanding.

---

[18] Relator, acting through its agents, has "personal knowledge of defendants' false claims by virtue of communications with defendants themselves" – held, relator was an original source. The *Allina* court, moreover, held that an association that derived its information from its members could qualify as a relator. *Allina* at 1040 and 1048 n.12.

IV. A Court Does Not Have Authority to Award Statutory Attorneys Fees under the FCA When it Lacks Subject Matter Jurisdiction.

The Tenth Circuit determined that a district court has the authority to award attorneys fees under 31 U.S.C. §3730(d)(4) even when the underlying FCA action has been dismissed for lack of subject matter jurisdiction. *Praxair*, 1055-1058. This decision raises "an important question of federal law that has not been, but should be, settled by this Court." Supreme Ct.R. 10(c)

This Court previously has recognized the inherent power of courts to impose sanctions in order to manage their own affairs and achieve orderly and expeditious disposition of cases, *Chambers v. NASCO*, 501 U.S. 32, 43 (1991), and to impose sanctions pursuant to F.R.Civ.P. 11 despite the fact that a court lacked jurisdiction over the action. *Willy v. Coastal Corp.*, 503 U.S. 131 (1992); *see also, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). Yet, it has not ruled on the important question of whether a court that lacks subject matter jurisdiction under the FCA has jurisdiction to award attorneys fees under the fee-shifting provision of 31 U.S.C. §3730(d)(4).

The Tenth Circuit's ruling relied largely on a decision from the Seventh Circuit. *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001). Citizens for a Better Environment ("CBE") sued defendant steel company under 42 U.S.C. §11046(a)(1), which authorized suits against hazardous chemical facilities in certain instances. The district court dismissed the suit for lack of a justiciable controversy and

denied defendant's request for an award of attorneys fees under 42 U.S.C. §11046(f).[19] The Seventh Circuit disagreed with the district court's determination that if CBE lacked standing to seek civil penalties, the court lacked jurisdiction to award attorneys fees, stating that "courts that lack jurisdiction with respect to one kind of decision may have it with respect to another." *Id.* at p. 926.

An opposite conclusion with respect to 42 U.S.C. §§1983 and 1988, was reached in *Branson v. Nott*, 62 F.3d 287 (9th Cir.), *cert. denied*, 516 U.S. 1009 (1995), where a citizen brought four *pro se* suits under 42 U.S.C. §1983 against Los Angeles County and other law enforcement officers. The defendants filed a motion to dismiss the complaint which the district court granted, and ordered plaintiff to pay $3,465 in attorneys fees.[20]

On appeal, the Ninth Circuit affirmed the dismissal, agreeing that the district court lacked subject matter jurisdiction over the citizen's §1983 claim. However, it reversed the district court's award of attorneys fees "because [if] the district court lacked subject matter jurisdiction over

---

[19] The statute at issue in *Citizens for a Better Environment* was 42 U.S.C. §11046(f), which provides in part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. . . .

42 U.S.C. §11046(f).

[20] 42 U.S.C. §1988(b). That statute provides that:

> In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[the citizen's] purported civil rights claim in the first instance, it also lacked the power to award attorney's fees under the civil rights attorney fee statute." *Id.* at 292-93. *Accord, Ass'n for Retarded Citizens v. Thorne*, 68 F.3d 547, 552 (2nd Cir. 1995) (relying on *W.G. ex rel. D.G. v. Senatore*, 18 F.3d 60 (2nd Cir. 1994)); *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990). *See also W.G. ex rel. D.G. v. Senatore*, 18 F.3d at 64 (motion pursuant to 20 U.S.C. §1415(e)(4)(B) for attorneys fees and costs denied because "fee-shifting provisions cannot themselves confer subject matter jurisdiction.")

Other than *Praxair*, there is no case that has directed that a court that lacks subject matter jurisdiction under the FCA may award attorneys fees under its fee-shifting provision, 31 U.S.C. §3730(d)(4). District courts have simply skirted the issue. *E.g. United States v. New York City Health & Hospital Corp.*, 2000 U.S. Dist. LEXIS 15677 (S.D.N.Y. 2000), *aff'd sub nom., United States v. New York Med. College*, 252 F.3d 118 (2nd Cir. 2001) (case was dismissed under Rule 9(b) motion for reasonable attorney's fees because the action was not "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.") *See also, Praxair*, 207 F.Supp.2d at 1187.

The decisions in other areas of law, and the lack of discussion from the district and circuit courts on the issue of whether the fee-shifting provision creates jurisdiction under the FCA, make it appropriate for this Court to address this important question of federal law.

V. A Party Who Succeeds In Having A FCA Case Dismissed Should Not Be Deemed a Prevailing Party For Purposes of The Fee-Shifting Provision Of The FCA.

Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party". The fee-shifting provision of the FCA allows defendant to recover its:

> reasonable attorneys' fees and expenses, if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

31 U.S.C. §3730(d)(4).

The FCA does not define the term "prevailing party". The Tenth Circuit determined, however, that "Praxair is a prevailing party" because:

> [T]he result of the district court's summary judgment decision materially changed the legal relationship between Grynberg and Praxair. Grynberg's campaign to declare Praxair an entity 'causing' a false claim to be made has reached final resolution. As Grynberg is now prohibited from bringing further claims on these facts, Praxair is a prevailing party.

Praxair at 1057. This decision is unique in the realm of FCA cases and is at odds with many circuit rulings involving other federal statutes.

The "'touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.'" *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (quoting

Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 792 (1989)). "To be a prevailing party, a party must receive at least some relief on the merits of [its] claim such as a judgment, an injunction, or a consent decree." *Horner v. Kentucky High Sch. Ath. Ass'n*, 206 F.3d 685, 698 (6th Cir. 2000). In *Branson v. Nott*, 62 F.3d at 293, the court held in the context of a claim under 42 U.S.C. §1983 and request for attorneys fees under 42 U.S.C. §1988, that a defendant is not a "prevailing party" when dismissal is mandated by a lack of subject matter jurisdiction. *See Keene Corp. v. Cass*, 908 F.2d at 298. *Accord Miles v. California*, 320 F.3d 986 (9th Cir. 2003) (noting that 'costs under Rule 54(d) may not be awarded where an underlying claim is dismissed for lack of subject matter jurisdiction).

Aside from the FCA, there are numerous other statutes which authorize the award of attorneys fees to the "prevailing party", such as the Civil Rights Act of 1964, 42 U.S.C. §2000e5(k), the Voting Rights Act Amendments of 1975, 42 U.S.C. §1973l(e), and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. In *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) for example, this Court reviewed the legislative history of §1988 and found that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." This Court's "respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Accord, Hewitt v. Helms*, 482 U.S. 755, 760 (1987). Unlike those decisions, the defendants in *Praxair* did not receive relief on the "merits of [their] claim"; they succeeded in convincing the district court not to hear the case.

The Eighth Circuit reached a similar conclusion under the EAJA. *Keene Corp. v. Cass*, 908 F.2d at 298 (internal citations omitted) ("where a complaint has been dismissed for lack of subject matter jurisdiction, the defendant has not 'prevailed' over the plaintiff on any issue central to the merits of the litigation.") The Seventh Circuit agreed in *Jackson v. Chater*, 94 F.3d 274, 277-78 (7th Cir. 1996) (holding that remand for ALJ to take additional evidence did not make plaintiff prevailing party, where remand order did not reverse Commissioner's position). The Fourth Circuit reached the same conclusion in *Finn v. United States*, 856 F.2d 606 (4th Cir. 1988) (holding that plaintiffs were not considered prevailing parties under the Equal Access to Justice Act, 28 U.S.C. §2412(d) where the district court did not have subject matter jurisdiction over the complaint and never addressed the merits of the plaintiff's case).

This conflict between the circuits over whether dismissal for lack of subject matter jurisdiction alters the legal relationship between the parties, such that a defendant becomes a "prevailing party" under the FCA or comparable fee-shifting statutes, should be settled by this Court. The Tenth Circuit's decision under the fee-shifting provision of the FCA is without precedent, and it frames an important question of federal law that arises frequently, and should be settled by this Court.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

PHILLIP D. BARBER, P.C.

PHILLIP D. BARBER
1675 Larimer Street, Ste. 620
Denver, CO 80202
303-894-0880

EDWARD A. DAUER, ESQ.
2255 East Evans Avenue
Denver, CO 80208

MICHAEL S. PORTER, ESQ.
4465 Kipling Street
Wheat Ridge, CO 80033

Attorneys for the Petitioner

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED NOVEMBER 15, 2004

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 01-1214 and 01-1242

UNITED STATES OF AMERICA ex rel.
JACK J. GRYNBERG

Plaintiff-Appellant-Cross-Appellee,

v.

PRAXAIR, INC.,

Defendant-Appellee-
Cross-Appellant,

NIELSON & ASSOCIATES, INC.,

Defendant-Appellee.

OPINION

Relator Jack J. Grynberg filed a *qui tam* action[1] under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, against Defendants Nielson & Associates, Inc. (Nielson) and Praxair, Inc. (Praxair). *See United States ex rel. Grynberg v. Praxair, Inc.*, 207 F. Supp. 2d 1163 (D. Colo. 2001). He claimed Defendants knowingly presented or caused to be presented

[1] The Latin phrase "*qui tam*" is an abbreviation for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning, "who as well for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY 1262 (7th ed. 1999). An individual bringing a *qui tam* action on behalf of the Government is known as a "Relator." *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1041 (10th Cir. 2004).

false valuations of royalties owed to the Government for carbon dioxide (CO_2) production in violation of 31 U.S.C. § 3729(a)(7).[2] He now appeals the district court's grant of summary judgment in favor of Defendants.

I. PROCEDURAL BACKGROUND

The purpose of the FCA "is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266. A private individual, the Relator, "may bring a civil action for a violation of [31 U.S.C. § 3729] for the person and for the United States Government . . . in the name of the Government." 31 U.S.C. § 3730(b)(1). The Government may elect to intervene and proceed with the action. 31 U.S.C. § 3730(b)(2). If the Government declines to intervene, the Relator may continue the action. 31 U.S.C. § 3730(c)(3). Either way, the Relator receives a share of any Government recovery. 31 U.S.C. § 3730(d). Pursuant to the FCA, Grynberg's Complaint was filed under seal and remained sealed until the United States Department of Justice advised the district court the Government would not intervene. *See* 31 U.S.C. § 3730(b)(2). At that time, the

---

[2] Section 3729(a)(7) extends liability to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government. . . ." 31 U.S.C. § 3729(a)(7). "This subsection has been referred to as the 'reverse false claims provision' of the FCA." *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 681-82 (10th Cir. 1998) (*quoting Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 565 (8th Cir. 1997)). A reverse false claim is documentation resulting in an underpayment to the Government, as opposed to a false claim, generally referring to an inflated or false bill for payment from the Government.

seal was lifted and an Amended Complaint was served on Nielson and Praxair.

Following discovery, Nielson and Praxair filed separate motions for summary judgment.[3] The district court granted summary judgment on three different bases, holding: 1) there was no evidence to suggest either Defendant made "knowingly false" statements to the Government; 2) the court lacked subject matter jurisdiction because the *qui tam* action was based on publicly disclosed allegations or transactions; and 3) the claim was barred because it was premised on information known to the Government prior to 1986. The district court ordered Grynberg to pay Defendants' costs, but left each party to bear its own attorney fees. Praxair and Nielson sought reconsideration of the district court's apportionment of attorney fees, maintaining that Grynberg's lawsuit was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment" under 31 U.S.C. § 3730(d)(4). The district court denied reconsideration. Grynberg appeals the dismissal of his claim (No. 01-1214) and Praxair cross-appeals the denial of its request for attorney fees and expenses (No. 01-1242).[4]

Grynberg claims the district court erred: (1) by applying an incorrect legal standard in granting the motions for summary judgment; (2) in holding that Praxair and Nielson's candor in their communications with the Government precluded, as a matter of law, a finding that their

---

[3] The district court had previously denied Defendants' separate motions to dismiss the Amended Complaint with prejudice.

[4] Grynberg's Notice of Appeal included several challenges to the district court's rulings on a protective order but he does not argue these issues on appeal.

statements were knowingly false; (3) in holding Grynberg's claim was jurisdictionally barred under the "public disclosure bar"; (4) in applying the pre-1986 law precluding claims based on allegations and transactions within the Government's knowledge; and (5) in concluding Praxair could not be liable because it did not submit royalty statements to the Government.[5] Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's conclusion that Grynberg failed to establish subject matter jurisdiction. We therefore do not reach the remainder of the issues presented in Grynberg's appeal, No. 01-1214. However, as to Praxair's cross-appeal, No. 01-1242, we reverse the denial of attorney fees and remand for proceedings consistent with this opinion.

II. FACTUAL BACKGROUND

Defendant Nielson, a small, privately held Wyoming corporation, produces and sells oil, hydrocarbon liquids and CO_2 from the "McCallum" fields in northern Colorado under leases with the United States Government. Defendant Praxair owns and operates an industrial plant designed to purify and convert Nielson's raw CO_2 into liquid suitable for beverages, food processing and other uses. The valuation method for CO_2 royalties owed to the Government is based on an "Agreement for the Sale of Carbon Dioxide" (Agreement) executed in June, 1983

[5] Nielson and Praxair respond to each of these arguments and further propose additional reasons to affirm the district court's judgment, including a challenge to the constitutionality of the FCA if Grynberg's claims are allowed to proceed. The United States intervened solely to defend the statute's constitutionality. Because we affirm the district court's decision on jurisdictional grounds, we need not reach the constitutional issues.

between Conoco, Inc. (Conoco) (who later sold to Nielson) and Praxair's predecessor, Liquid Carbonic Corporation (Liquid Carbonic). The current Agreement between Nielson and Praxair remains unchanged from the 1983 version in all relevant aspects. Grynberg alleges Nielson and Praxair perpetuated Conoco and Liquid Carbonic's practice of submitting reports misstating the valuation of CO_2 production, resulting in an underpayment of royalties owed to the Government.

A. The 1983 Agreement

The McCallum leases were originally executed between Conoco and the federal Government for oil production. For many years, Conoco extracted and sold oil from the McCallum production. In 1926, CO_2 was discovered during drilling. The raw CO_2 gas, produced in conjunction with the oil, was vented to the atmosphere. This practice was known to and approved by the federal regulatory authorities.[6] It changed with the Agreement.

Under the Agreement, Liquid Carbonic would construct a plant to purify the raw CO_2 gas produced and delivered by Conoco and convert it into liquid CO_2 for food processing, beverages and other uses. Liquid Carbonic would then purchase the finished product based on a price per ton shipped from the plant, a quantity reported by Liquid Carbonic to Conoco each month. The base price per ton under the Agreement was subject to several adjustments, including annual market price fluctuations and monthly adjustments based on the quality of the raw CO_2

[6] The venting of CO_2 during this period is not challenged in this action.

gas delivered to the plant by Conoco. The Agreement also provided that Liquid Carbonic would return 80% of all vent gases produced from the processing plant so Conoco could reinject the gas. This practice was dependent on Conoco providing the pipeline to permit the return of those gases. Conoco was to pay all royalties on the CO_2 delivered to Liquid Carbonic.

In 1994, Nielson purchased the McCallum leases from Conoco and succeeded Conoco as "Seller" under the Agreement. In 1996, Liquid Carbonic merged into Praxair, making Praxair the Agreement's "Buyer." Neither Praxair nor Liquid Carbonic have ever been affiliated with Nielson or Conoco, nor have they been a party to the McCallum leases. There is no allegation or evidence of any conspiracy, side-deal or other arrangement between the defendants.[7]

B. Government Involvement

On October 22, 1984, Conoco sent a copy of the Agreement to the Department of the Interior's Minerals Management Service (MMS) and asked for approval of its terms. Conoco explained it would supply the raw CO_2 for processing (from the wellhead) and receive payment based on the price of the finished product shipped from Liquid Carbonic's plant (the plant "tailgate.") Conoco also described its plan to return and reinject vent gases into one of its wells but included a schematic showing some gas would be flared.

---

[7] Although Grynberg unsuccessfully argued to the district court the Agreement was not an arm's-length transaction, he has not raised this argument on appeal.

Forewarned that Conoco was requesting a royalty valuation at Liquid Carbonic's plant tailgate, the MMS wrote to express its concern about the impact on the measurement at the tailgate, as opposed to a larger volume measurement if it were taken at the wellhead. In a letter dated March 14, 1985, the MMS wrote, "if royalty is to be paid on the volume of gas leaving the plant, there could be significant differences, due to plant losses, from the volumes the [wellhead] allocation meters indicate." (R. Vol. II, Tab 19 at 220.) Conoco responded that the plant's vent gas losses would diminish once operations stabilized, but tempered this statement by advising the MMS there would continue to be unavoidable CO_2 gas loss due to the quality of the raw CO_2 gas and the anticipated plant efficiency. Conoco reiterated its plan to reinject some of the gas and pointed out the Agreement provided a means to sell CO_2 reserves, where previously the gas was shut-in or flared.

On April 4, 1985, the MMS informed Conoco "the price reduction provisions are accepted as part of the arm's length contract" and acknowledged the arrangement with Liquid Carbonic "created the only market for CO_2 in the area." (R. Vol. II, Tab 21 at 22-27.) Specifically, the MMS noted that the annual variations in price depended on market prices and recognized the contract provisions allowed "for decreased prices in the event(s) any hydrocarbons . . . exceeded specified levels or if the carbon dioxide content fell below [a certain percent] of the volume of the gas stream." (*Id.* at 225-226.) However, the MMS directed that royalties must never be based "upon less than the gross proceeds accruing to Conoco from the sale of the CO_2." (*Id.* at 224.) It precluded the deduction of processing allowances from the gross proceeds and required royalties

be paid on any additional "up-front" payments or tax and/or royalty reimbursements. (*Id.* at 227.) Additionally, the MMS advised Conoco to secure approval of its "production reporting sequence" from the Bureau of Land Management (BLM).[8] (*Id.* at 223.) Despite its plans at the time of the Agreement, Conoco never installed the piping necessary for the return and reinjection of the gas into its well; it was vented.

The venting of the CO_2 triggered further scrutiny in November 1985. At that time, the MMS wrote to the BLM to express its concerns regarding the results of an audit of Conoco's CO_2 production from the McCallum leases. The MMS informed the BLM that the reporting forms for "the production months October 1984 through August 1985" indicated "the majority of CO_2 production [was] being vented." (*Id.*, Tab 22 at 230.) It requested the BLM provide information addressing Conoco's authority to vent this CO_2. The BLM responded that Conoco's gas venting was approved in April 1980. Again recognizing that "until recently, there had been no market for CO_2 in the McCallum Field area," the BLM stated it did not wish to "refute" the 1980 approval on the basis of the current venting. (*Id.*, Tab 23 at 243.)

In June 1987, the BLM conducted a "Production Accountability Inspection" of Conoco's McCallum CO_2

---

[8] As the district court noted, "generally, the MMS is responsible for addressing royalty calculations and payments, while the BLM addresses gas production issues, including the location where the volume is measured for royalty purposes." *See, e.g.*, 30 C.F.R. §§ 206.152; 206.154(a)(1). (R. Vol. V, Tab 118 at 999.)

production.[9] The inspection included BLM review of the Agreement and its 1985 approval, interviews of several employees to clarify Conoco's procedures and a review of production documentation. During three separate visits between June and July 1987, BLM representatives inspected Conoco's facilities and were made aware CO_2 was either flared during natural gas production or delivered to Liquid Carbonic's plant, while other CO_2 was delivered to the plant from CO_2 wells. The BLM also noted Liquid Carbonic vented gas without metering the amount at the vent and there was "shrinkage" (*i.e.*, other gas loss) from Conoco's operations.[10]

In 1988, Conoco requested the BLM approve an additional supply of CO_2 to Liquid Carbonic from a South McCallum unit well (the previous activity and approvals all related to wells in the McCallum unit). In response to the BLM's follow-up to the request, Conoco again explained its production procedures, including its practice of venting excess gas. Conoco also reiterated its measurement practices, the volume of vented gas being the difference

---

[9] The BLM annually conducts a Production Accountability Inspection of the production activity for a given month in the McCallum fields. During these inspections, the BLM requests and receives from Nielson (and previously Conoco) documents reporting the actual wellhead production volumes as distinguished from the plant "tailgate" volumes reported for royalty purposes. As described by one BLM official, the Production Accountability Inspection is a detailed investigation "to determine whether royalty [is] being reported accurately." (R. Vol. V, Tab 118 at 1001.)

[10] The estimated shrinkage was questioned during the inspection and the BLM's concern was transmitted to Conoco by letter dated July 27, 1987. The BLM notice stated, "we will keep you informed as our consideration continues." (R. Vol. II, Tab 28 at 265.) There are no further documents referencing this notation and no indication the BLM required Conoco to take any corrective action.

between volumes produced at the wellhead and volumes measured at the Liquid Carbonic plant tailgate (*i.e.*, volumes sold to Liquid Carbonic). These volumes were reported on a monthly basis to the Colorado Oil & Gas Conservation Commission (COGC).[11] On May 18, 1989, Conoco received BLM's approval. Specifically, the BLM stated the "explanation of measurement and allocation procedures for the production facilities associated with the production of CO_2 gas from South McCallum Unit appears appropriate." (*Id.*, Tab 39 at 297.)

In 1992, Liquid Carbonic sought the BLM's permission to construct a dry ice manufacturing facility at its plant.[12] Liquid Carbonic informed the BLM that its plans included a means whereby the CO_2 vapor released from the dry ice machinery would be piped back into the main CO_2 plant. The plan to recycle the CO_2 vapor, however, was later abandoned as uneconomical. As was the case with the unconstructed pipe for the return of CO_2 to Conoco's wells, the Government became aware the vapor from Liquid Carbonic's dry ice plant was vented and not recycled.

Nielson purchased the McCallum and South McCallum leases from Conoco in 1994. In 1996, the MMS and BLM again inquired about Nielson's royalty calculation and reporting practices. In response, Nielson candidly supplied BLM with all information requested, including a sample of the worksheet used to calculate the gas value

---

[11] States may contract to audit royalty payments from federal leases within the states pursuant to Section 205 of the Federal Oil and Gas Royalty Management Act of 1982.

[12] Permission was required because the plant is on land leased from the federal Government.

and volume for royalty purposes. The worksheet identified the differences between the total wellhead production volumes and the plant tailgate "sold" volumes reported for royalty purposes (*i.e.*, excluding vented gas volumes) and the calculation of price. Nielson also provided two updated schematics, including a schematic showing the originally anticipated gas reinjection line with the notation: "reinjection line by design currently being flared." (*Id.*, Tab 51 at 366.) The other schematic, an illustration of Praxair's plant, showed the gas vents throughout the liquid CO_2 production and the dry ice manufacturing facility.

On August 22, 1996, the MMS issued to Conoco and Nielson an "Order to Comply" pursuant to 30 C.F.R. § 206.154, charging them with having incorrectly reported production and royalties from the South McCallum wells. The order issued "because of [the] unauthorized measurement point being at the tailgate of the CO_2 plant. . . ." (*Id.*, Tab 57 at 3910.) Nielson appealed the Order to Comply, noting its understanding that CO_2 volume measurement at the plant tailgate had been previously approved for the McCallum production in 1985 and the South McCallum production in 1988. A meeting followed between representatives of BLM, Praxair, Nielson, and Conoco. Ed Calvert, representing related companies that were Nielson's partners in the purchase of Conoco's leases, was also present. At the meeting, the BLM confirmed its prior approval of plant tailgate volume measurement with regard to the McCallum unit, but noted approval for the South McCallum unit was not as certain. The Government representatives suggested Nielson seek formal BLM approval for plant tailgate measurement for both McCallum and South McCallum CO_2 production, retroactive to November 28, 1988. Nielson complied with the

suggestion and the BLM issued its retroactive approval of the off-lease plant tailgate measurement for CO_2 production at both units. On November 27, 1996, MMS withdrew its Order to Comply, closed Nielson's appeal and "determined that Nielson & Associates, Inc., are now in regulatory compliance." (R. Vol. III, Tab 61 at 413.)

C. Grynberg's Investigation

Jack Grynberg is a petroleum engineer who is the president and co-owner of Grynberg Petroleum Company in Denver, Colorado. In late summer or fall of 1997, Grynberg was researching the acquisition of a liquid CO_2 supply for use in the recovery of an oil field. [Vol. IV, Tab 104 at 722; Vol. III, Tab 66 at 439]. Because he thought Praxair's prices were high, he telephoned Jim Nielson, Nielson's president. Although the precise conversation is disputed, Grynberg alleges Jim Nielson complained Praxair was taking 30% of the natural CO_2 produced and using it as part of its processing operation without payment. This statement motivated Grynberg to conduct an investigation into the situation. As described by Grynberg, the investigation included a subsequent conversation with Jim Williams, Nielson's chief operations officer, regarding the pricing arrangements between Nielson and Praxair. Grynberg also filed a request under the Freedom of Information Act (FOIA) to acquire a copy of the Agreement and other related documents, but his request was denied. Unable to get direct information regarding the Agreement, Grynberg sent an associate to research the records at the COCG office to learn the amount of Neilson's payments for conservation taxes on its CO_2 production. In addition, he referred to an industry publication of gas and oil production records. Armed with this information, he calculated

Nielson's reported payments received for CO_2 and the royalties paid to the Government. He then determined the reasonable market value of the CO_2 by making phone calls to end users and interviewing operators of other plants. In the meantime, he directed one of his employees to take photographs of the Praxair plant from the public county roads. That exercise revealed the vents used during operations. His efforts culminated in the conclusion that "the volumes reported on [Nielson's] MMS Forms 2014 and 3160 are fraudulent and do not reflect the actual gas production from the McCallum Fields, as required by MMS regulations." (R. Vol. IV, Tab 104 at 725-26.) Grynberg also credits his investigation for the discovery that the price Praxair paid for the CO_2 was intentionally undervalued. Although he concedes the actual numbers reported to the Government throughout the life of the Agreement were accurate, he insists the royalty submissions were knowingly false because Nielson and Praxair intentionally violated federal regulations by failing to pay royalties on wellhead production and by reducing the tailgate price through the deduction of processing costs.

III. DISCUSSION

A. Grynberg's Appeal, No. 01-1214.

Grynberg contends the district court applied an improper standard when granting summary judgment. He argues the court incorrectly determined his claims were facially suspect in economic terms and, accordingly, erroneously required him to "demonstrate a particularly compelling case in order to evade summary judgment." (Appellant's Brief at 19-20.) Grynberg's argument is two-pronged. First, he argues the court's "particularly compelling" is a higher standard than announced in *Matsushita*

Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Second, he argues his claim is not economically suspect.

The district court based its statement that Grynberg, because of the particular nature of his claims, would have to show a "particularly compelling case" to avoid summary judgment on *Matsushita*. In *Matsushita*, the Court noted that, given the requirement that, in order to avoid summary judgment, the nonmoving party must present evidence to show a genuine issue of fact, "it follows . . . that if the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587. The district court's application of the *Matsushita* standard here requires too much of Grynberg. The Court in *Matsushita* was simply noting that, because material issues for trial are required to be "genuine" to survive summary judgment, it was appropriate for the court to look with skepticism at arguments which did not seem to make economic sense, and to require that evidence supporting those arguments be more persuasive. *See id.* This stops short of the district court's "particularly compelling" standard enunciated in the case at hand.

In any event, not all of Grynberg's claims are economically suspect. Certainly, his early claims that Nielson conspired with Praxair to sell CO_2 at a price far below market is facially suspect in that it would make little economic sense for Nielson to take such a drastically low price to save a small amount in royalties. However, by the time of summary judgment, Nielson's claims had evolved into an argument that makes economic sense – that

Nielson sold CO_2 to Praxair at a low price to reflect the fact that Praxair rather than Nielson was bearing the cost of processing and that Nielson was then reporting the lower price and volume for royalty purposes when it should have reported the higher value of the gas at the wellhead.

The district court's statement requiring Nielson to show a "particularly compelling case" was incorrect and, thus, the standard of review applied by the district court was technically improper. However, this error has no effect on our review of the issue as our standard of review is de novo. *See Simms v. Oklahoma ex rel. Dep't of Mental Health & Sub. Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). As a result, this court will examine the evidence produced on summary judgment applying the correct standard mandated by Rule 56(c) and come to its own conclusions as to whether summary judgment was proper.

"We review a grant of summary judgment de novo, employing the same legal standard as the district court, specifically Fed.R.Civ.P. 56(c)." *Morgan v. McCotter*, 365 F.3d 882, 887 (10th Cir. 2004). Although the district court granted summary judgment on several legal bases, we must begin with its conclusion that Grynberg failed to meet the jurisdictional requirements of 31 U.S.C. § 3730(e)(4)(A) & (B). "Questions of jurisdiction, of course, should be given priority – since if there is no jurisdiction there is no authority to sit in judgment of anything else." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000); *see also United States v. Ceballos-Martinez*, 371 F.3d 713, 715 (10th Cir. 2004) ("'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the

fact and dismissing the cause.'") (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)).

B. Subject Matter Jurisdiction

"Satisfaction of the provisions of 31 U.S.C. § 3730(e)(4) is a question of subject matter jurisdiction." *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1003 (10th Cir. 1996). The interpretation and application of § 3730(e)(4) is reviewed *de novo*. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 551 (10th Cir. 1992). Because federal courts are courts of limited jurisdiction, "we presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction." *Id.* Therefore, Grynberg "bears 'the burden of alleging facts essential to show jurisdiction under the False Claims Act as well as supporting those allegations by competent proof.'" *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1202 (10th Cir. 2003) (en banc) (quoting *Advanced Sciences, Inc.*, 99 F.3d at 1004).

Section 3730(e)(4) provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and

> independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A) & (B). Grynberg argues the district court erred in its application of § 3730(e)(4) by: (1) holding the transactions on which his claim is based were a matter of "public disclosure" at the time he filed the action; (2) declaring he was not the "original source;" and (3) finding he failed to provide the information to the Government before filing his action.

The jurisdictional inquiry under 31 U.S.C. § 3730(e)(4)(A) & (B) requires a four-step analysis:

> (1) whether the alleged "public disclosure" contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made "public" within the meaning of the False Claims Act; (3) whether the relator's complaint is "based upon" this public disclosure; and, if so, (4) whether the relator qualifies as an "original source."

Kennard, 363 F.3d at 1042 (quotations omitted).[13] This analytical framework is required in all *qui tam* actions and does not hinge on whether the Government is involved

[13] Whether a "public disclosure" has occurred is a jurisdictional inquiry arising out of the same statute that creates the cause of action, precipitating an investigation necessarily intertwined with the merits. *Holmes*, 318 F.3d at 1203; *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 (10th Cir. 1996); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Therefore, the district court correctly resolved this issue when determining the motions for summary judgment rather than at the time of the motions to dismiss.

in an investigation of the alleged fraud. *Holmes*, 318 F.3d at 1204. "The point of the public disclosure test is to determine whether the qui tam lawsuit is a parasitic one." *Id.* at 1207 nn. 6 & 7 (stating that a parasitic law suit occurs when the relator uses information already in the public domain rather than information personally obtained). "A court should address the first three public disclosure issues first. Consideration of the fourth, 'original source' issue is necessary only if the court answers the first three questions in the affirmative." *Kennard*, 363 F.3d at 1042 (quotations omitted). Consequently, we first address whether Grynberg's claim is based on publicly disclosed allegations and transactions from a listed source. If so, we will next consider whether Grynberg is an original source.

1) Public Disclosure

The district court held the transaction underpinning Grynberg's allegations, valuation at the tailgate pursuant to the terms of the Agreement, was publicly disclosed twice. The first disclosure occurred when the MMS sent its response to Grynberg's FOIA request. Although it declined to send a copy of the Agreement, it provided a portion of its 1985 letter to Conoco, triggered by Conoco's request for MMS approval of the 1983 Agreement. The response to Grynberg included two pages from the seven-page letter which described the Agreement between Conoco and Liquid Carbonic. The district court found this disclosure revealed both the location at which the royalty would be measured (the tailgate) and how the price would be calculated (a formula based on adjusted fair market values), thus disclosing the basis of allegedly fraudulent transactions. The second public disclosure occurred at the

1996 meeting to discuss the Order to Comply. There, the substance of the administrative investigation was publicly disclosed to Ed Calvert, who the district court found to be previously unconnected with the fraud.[14]

We now turn to the first three steps of our inquiry to determine whether the transaction forming the basis of Grynberg's complaint was publicly disclosed. There is no dispute that the excerpt from the 1985 letter is an administrative report, a source falling squarely within those listed in § 3730(e)(4)(A). But Grynberg maintains the MMS document does not include any allegation, nor does it include the transaction on which he bases his claim. He argues the MMS disclosure of a mere two pages, with the actual figures in the pricing formulas redacted, is only part of the information necessary to describe the transaction. In his view, the disclosure is flawed because it "contains no statement that the royalty volume was determined at the 'tailgate rather than wellhead;' no statement that 'gas valuation [was] based on the contract price rather than higher finished product sales prices;' and no statement of the great discrepancy between the contract price and the market price." (Appellant's Opening Br. at 43.) He concludes a fair reading of the disclosed portion of the document, without more, would not raise any suspicions, and therefore, it is insufficient to raise a public disclosure bar to his claim.

Grynberg primarily relies on *United States ex rel. Springfield Terminal Ry. v. Quinn*, 304 U.S. App. D.C. 347,

---

[14] Because we agree the MMS response to Grynberg's request for information was a publicly disclosed transaction, barring his claim unless he is the original source, we need not reach his contention the district court erred in finding Calvert a stranger to the fraud.

14 F.3d 645 (D.C. Cir. 1994), to support his position. There, Springfield and its president, David Fink (Relators), were involved in a labor dispute in which the National Mediation Board appointed Dr. Francis X. Quinn as an arbitrator. *Id.* at 647. After reviewing Quinn's pay vouchers, produced during the discovery phase of a prior litigation, Relators realized that, when viewed in conjunction with their involvement in the arbitration proceedings, it appeared Quinn had fraudulently billed the Government for services not actually rendered in connection with the arbitration proceedings. *Id.* at 647-48. After conducting further investigation, including calling numbers found on Quinn's telephone records, Relators unearthed Quinn's fraudulent activity and filed a *qui tam* action. *Id.* at 648. The district court granted Quinn's motion to dismiss the action because it found the suit was based on records publicly disclosed during the prior litigation. *Id.*

The appeals court saw it differently. Although it readily agreed the information was publicly disclosed within the meaning of the FCA, it held the disclosed information did not include an "allegation" or "transaction." *Id.* at 653. The court identified "a distinction between 'allegations or transactions' and ordinary 'information,'" reasoning the common usage of "the term 'allegation' connotes a conclusory statement implying the existence of provable supporting facts" while "the term 'transaction' suggests an exchange between two parties or things that reciprocally affect or influence one another." *Id.* at 653-54. The court continued:

> On the basis of plain meaning, and at the risk of belabored illustration, if X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the

> fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed. The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.

Id. at 654. Thus, the court concluded the dual purpose of the FCA provision, allowing matters protecting the public fisc to proceed while barring parasitic law suits, is best served by applying a jurisdictional bar "only when enough information exists in the public domain to expose the fraudulent transaction (the combination of X and Y), or the allegation of fraud (Z). When either of these conditions is satisfied, the government itself presumably can bring an action under the FCA and there is no place in the enforcement scheme for *qui tam* suits." *Id.*

We have not adopted the mathematical formula espoused by the D.C. Circuit in *Springfield* and we decline to do so here. But even under *Springfield's* analysis, Grynberg fails to establish jurisdiction. Here, the uncontested evidence, including averments found in Grynberg's several affidavits, conclusively confirms the public domain contained *all* the elemental aspects of the allegedly fraudulent transaction.

It is generally accepted that a response to a request under the FOIA is a public disclosure. *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723-24 (6th Cir. 1999); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519-20 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939, 138 L. Ed. 2d 135, 117 S. Ct. 1871

(1997); *see also United States ex rel. Reagan v. East Texas Medical Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 845 n.15 (S.D. Tex. 2003) (and cases cited therein). While the information provided to Grynberg redacted the precise numbers, it revealed the existence of the Agreement, the point of production (the wellhead), the liquification of the CO_2 through Liquid Carbonic's plant while Conoco still maintained possession of the gas, the purchase point (the tailgate), and the fact the price was adjusted at the tailgate. Grynberg's claim that the document did not state where the royalty would be valued is disingenuous. While the letter does not recite those facts in Grynberg's preferred form, it is written by the entity required to make a valuation judgment and it identifies the purpose of the correspondence is to "approve Conoco's 'production reporting sequence' for carbon dioxide (CO_2)" and the attached "Application for the Establishment of Royalty Values." (R. Vol. III, Tab 64 at 427.) Further, the heading on the pages produced identifies the remainder of the document as "Findings and Conclusions on Valuation of CO_2." (*Id.* at 428.) In this context, the document identifies the tailgate as the location of pricing and the fact the price will undergo adjustments. The only reasonable conclusion from these statements is that the royalty will be valued at the point of sale, and such location may entail a loss of value in the base amount used for royalty calculations.

Moreover, the information from the COGC, alleged by Grynberg to be the information allowing him to determine pricing, volumes and royalty in the absence of access to the Agreement, was publicly available. Further, the wellhead and tailgate volumes Grynberg relied on to support his claims were provided by a private service that collected, organized and reported the same information

submitted by producers to the Government. Clearly, "X" (wellhead as opposed to tailgate volumes) and "Y" (purchase and price adjustment at the tailgate) were within the public domain. Therefore, Grynberg's "additional information, even if nonpublic, cannot suffice to surmount the jurisdictional hurdles." *Springfield Terminal Ry. Co.*, 14 F.3d at 655. All of the material elements of the fraudulent transaction were already in the public domain.

Finding the transaction was publicly disclosed by a listed source, we next consider whether Grynberg's complaint is "based upon" this public disclosure. We apply a "restrictive interpretation of the threshold 'based upon' test [finding such interpretation] consistent with the dual purpose of the [FCA]." *Precision Co.*, 971 F.2d at 552. "Based upon" means "supported by" and the threshold analysis is "intended to be a quick trigger for the more exacting original source analysis." *Id.* (quotations omitted). Even *qui tam* actions only partially based upon publicly disclosed allegations or transactions may be barred. *Id.* The test is whether "substantial identity" exists between the publicly disclosed allegations or transactions and the *qui tam* complaint. *Id.* at 553-54. A comparison of the information in the public domain with the allegations contained in Grynberg's Amended Complaint leaves no question that the information disclosed by the MMS is the basis for his claim.

The crux of Grynberg's complaint is that Nielson and Praxair presented or caused to be presented a reverse false claim when Nielson filed its monthly royalty reports. He alleges the reports submitted are false because value and production are under-reported. The under-reporting is caused by the venting of gas and subsequent valuation at the tailgate, in violation of federal statute and regulation.

Indeed, in his disclosure to the Government, Grynberg's total submission of evidence in support of his allegations included the 1985 MMS letter and two memos: one written by Grynberg approximating the operating costs for a CO_2 plant in Cortez, Colorado, and another by his employee, comparing the prices at the Cortez plant and those at Praxair. His assumptions deriving from this information do not change the basis for his allegations. Accordingly, Grynberg's complaint is based on a publicly disclosed transaction under 31 U.S.C. § 3730(e)(4)(A), and he may proceed only if he is an original source under 31 U.S.C. § 3730(e)(4)(B).

2) Original Source

In the final step of the analysis, we look to § 3730(e)(4)(B), requiring an original source to have "direct and independent knowledge of the information on which the allegations are based" and to have "voluntarily provided the information to the Government" prior to filing suit. "Direct knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others." *Advanced Sciences, Inc.*, 99 F.3d at 1006-07; *see also United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1548-49 (10th Cir. 1996) (citing cases). In addition, independent knowledge cannot be "derivative of the information of others, even if those others may qualify as original sources." *Advanced Sciences, Inc.*, 99 F.3d at 1007; *see also MK-Ferguson Co.*, 99 F.3d at 1548-49. The district court determined Grynberg was not an original source, stating:

> [he was] not an insider, did not witness any fraud. Grynberg has not identified a single element of his "investigation" that involved anything other than

> second hand information, speculation, background information or collateral research (*i.e.* conversations with Nielson officers, conversations with various third parties, telephone calls to Praxair, FOIA requests, research at the COGCC, photographs from a public road, review of oil and gas publications, and speculation regarding what would have been a fair CO_2 price), precisely what the Tenth Circuit found insufficient in [*United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-1163 (10th Cir. 1999)].

Grynberg, 207 F. Supp. 2d at 1185. Grynberg contends the district court erred in not crediting his discovery of facts essential to his claim in his telephone call with Nielson. He disputes the district court's characterization of his knowledge as "second hand information," maintaining his knowledge is (1) "direct" because Nielson disclosed to him that Praxair allegedly applied a 30% volume reduction in pricing calculations and (2) "independent" due to his extensive investigation of various sources. As a result, he concludes he qualifies as an original source.

The burden is on Grynberg to show he is an original source. *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 800-02 92 Fed. Appx. 708 (10th Cir. 2002). To meet this burden, he must provide more than an "unsupported, conclusory allegation." *Id.* at 800 (quotations omitted). Grynberg is required to iterate specific facts demonstrating his direct and independent knowledge is "marked by the absence of an intervening agency . . . [and] unmediated by anything but [his] own labor." *Kennard*, 363 F.3d at 1044 (quotations omitted).

In *Kennard,* we recently addressed facts somewhat similar to those before us. There, in a *qui tam* action brought by two Relators, Relator Wright was a twenty-five year owner of royalty interests in gas wells on a tract of land near a Tribal reservation. *Id.* at 1040. Shortly after the operator of Wright's property sold its lease interests to Comstock, Wright's royalty payments dropped dramatically. *Id.* This raised Wright's suspicions that Comstock was underpaying him and others, including the Tribe. *Id.* at 1041. He contacted Relator Kennard and told him of his concerns. *Id.* Kennard proceeded to investigate. *Id.* Through research that included, *inter alia*, reviewing public records, the Relators concluded Comstock knew it was underpaying royalties to the Tribe. *Id.* With the assistance of an attorney, they drafted a *qui tam* complaint which was sent to the Government. *Id.* Their attorney, however, filed another *qui tam* complaint on behalf of the Tribe, based on the same information, one day before Relators filed their *qui tam* suit. *Id.* As a result, the district court dismissed the Relators' complaint for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4), concluding the basis of their claim was publicly disclosed via the Tribe's lawsuit and the Relators did not qualify as "an original source." *Id.*

On appeal, the Relators alleged their attorney stole their information in preparing the Tribe's *qui tam* action against Comstock, and therefore, the district court erred in applying the jurisdictional bar. We affirmed the information was publicly disclosed under § 3730(e)(4)(A) but reversed the dismissal, holding the Relators were "an original source" under § 3730(e)(4)(B). *Id.* at 1044, 1046.

We rejected Comstock's proposed requirement that Relators must possess knowledge of the "actual alleged

fraudulent submissions to the Government" to be an original source. *Id.* at 1044. Knowledge of the precise fraudulent submission to the Government is not necessary. *Id.* "A relator 'need only possess "direct and independent knowledge of the *information on which the allegations are based.*"'" *Id.* (quoting *Stone,* 282 F.3d at 803 and 31 U.S.C. § 3730(e)(4)(B)). We also declined to create a restriction limiting an original source to only insiders, finding no valid reason to do so. *Id.* at 1044-45.

Lastly, we refused to "adopt any bright-line rule disqualifying a relator as an original source when the relator examines public records." *Id.* at 1045. Rather, we recognized that detailed investigations of fraud on the Government may often require at least some reliance on public information; "it is the character of the relator's discovery and investigation that controls this inquiry." *Id.*; *Compare United States ex rel. Findley v. FPC-Boron Employees' Club*, 323 U.S. App. D.C. 61, 105 F.3d 675, 688 (D.C. Cir. 1997) ("A relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed."), *with Springfield Terminal Ry. Co.,* 14 F.3d at 657 ("[Relator] started with innocuous public information [and] completed the equation with information independent of any preexisting public disclosure.").

In concluding Relators qualified as an original source, even though part of their investigation included information in the public domain, we focused on two significant factors. First, Relator Wright did not refer to, examine, or rely on any public records. *Kennard.* 363 F.3d at 1046. Instead, he relied exclusively on his own personal, private royalty records and statements from Comstock and other

oil companies in forming his suspicions regarding Comstock's royalty payments. *Id.* Second, while Relator Kennard did examine public records in the course of his independent investigation, he did more than compile statistics. *Id.* Most importantly to Grynberg's case, Kennard "did not rely on a Government report dealing with the allegations and transactions on which the current *qui tam* action is based because no such document existed." *Id. No public documents disclosed the alleged fraud. Id.* As a result, we held that "Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source." *Id.*

Even so, "when a relator's *qui tam* action is based solely on *material elements* already in the public domain, that relator is not an original source." *Id.* at 1045. Unlike the Relators in *Kennard,* Grynberg's knowledge is neither direct nor independent. Grynberg cannot rely on Nielson's alleged disclosure of a 30% reduction of CO_2 between entry in the Praxair plant and volume measurement at the tailgate. This knowledge was not direct because he "did not see the fraud with [his] own eyes or obtain [his] knowledge of it through [his] own labor unmediated by anything else. . . ." *United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir. 1996). Instead, he derived it secondhand from Nielson, who had firsthand knowledge of the alleged fraud as a result of his employment. *Id.* Grynberg's knowledge also was not independent. Unlike *Kennard,* he relied on a publicly disclosed Government document revealing the transaction forming the basis of his claim – the 1985 MMS letter, and the statistics compiled by an independent service. Moreover, his investigation entailed telephone calls to gather common information, pictures taken from a public road and the

review of easily attained records. In this case, Grynberg was not the individual who "ferreted out the alleged fraud." *Kennard,* 363 F.3d at 1046. The same transaction was investigated by the MMS and BLM a year before Grynberg brought his claim.[15]

Consequently, we are led to the ineluctable conclusion that the character of Grynberg's discovery and investigation is insufficient to qualify him as an original source.[16] The district court was correct in concluding it lacked jurisdiction over Grynberg's claim. We affirm.

C. Praxair's Cross-Appeal, No. 01-1242.

Praxair advances two reasons for reversing the district court's decision releasing Grynberg from liability for Praxair's attorney fees and costs. First, it claims the district court erred as a matter of law when it imposed an unduly rigid standard, measuring the frivolousness of Grynberg's claim only as of the time of his initial complaint. Second, they argue Grynberg's amended complaint

---

[15] Moreover, the MMS was asked to approve a modified version of the Agreement in 2000 after Grynberg had brought his *qui tam* claim. The only substantial change between the 1983 version and the 2000 version is in the provisions for the expiration of the Agreement. The provisions at issue here remain unchanged. Thus, armed with all Grynberg's allegations and evidence, the MMS approved the modified Agreement on November 3, 2000, specifically addressing both the tailgate measurement and the price adjustment.

[16] Because Grynberg fails to satisfy the "direct and independent knowledge" element of the "original source" analysis, we need not consider whether he "voluntarily provided" this information to the Government as required under § 3730(e)(4)(B). *MK-Ferguson Co.*, 99 F.3d at 1548 n.3.

was within the parameters of § 3730(d)(4) of the FCA which provides for the award of attorney fees as follows:

> If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

31 U.S.C. § 3730(d)(4). We review the district court's decision to award attorney fees for an abuse of discretion, but review *de novo* the district court's application of the legal principles underlying that decision. *Nat'l Ass'n of Prof'l Baseball Leagues, Inc. v. Very Minor Leagues, Inc.*, 223 F.3d 1143, 1146 (10th Cir. 2000).

The FCA does not define the terms "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment," but the Act's legislative history suggests that the standard of § 3730(d)(4) is analogous to that used for claims for attorney fees brought under 42 U.S.C. § 1988. S.Rep. No. 99-345, at 29 (1986) ("[The False Claims Act] standard reflects that which is found in [§] 1988. . . ."), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5294; *see also Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006 n.4 (9th Cir. 2002); *Mikes v. Straus*, 274 F.3d 687, 705 (2d Cir. 2001).[17]

---

[17] Section 1988(b) provides in relevant part:

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A.

(Continued on following page)

Consequently, our precedent reviewing attorney fees under § 1988 is instructive.

Prior to engaging in that analysis, however, we must address, *sua sponte,* the district court's authority to award attorney fees when the underlying action has been dismissed for lack of subject matter jurisdiction.

A. Jurisdiction to Award Attorney Fees

The Ninth Circuit holds that, in those instances where § 1983 subject matter jurisdiction is lacking, the district court does not have the authority to impose § 1988 attorney fees for two reasons. *Branson v. Nott,* 62 F.3d 287, 292-93 (9th Cir. 1995). First, citing to precedent from the Eighth and Second Circuits, the court stated:

> By itself, § 1988 does not provide the district court with jurisdiction to grant an attorney fee award where subject matter jurisdiction to hear the underlying § 1983 claim is lacking: "section 1988 does not by its terms confer subject matter jurisdiction upon federal courts, but rather relies upon the provisions of other federal statutes, such as section 1983 read in conjunction with 28 U.S.C. § 1343 (1988), . . . to confer subject matter jurisdiction." *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990); *see also, W.G. ex rel. D.G. v. Senatore*, 18 F.3d 60, 64 (2d Cir. 1994) (concluding that "fee shifting provisions cannot themselves confer

---

§ 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

> subject matter jurisdiction."); *Pierre v. Jordan*, 333 F.2d 951, 958 (9th Cir. 1964) (observing that § 1988 does not establish subject matter jurisdiction), *cert. denied*, 379 U.S. 974, 85 S. Ct. 664, 13 L. Ed. 2d 565 (1965). And "where there is no subject matter jurisdiction to proceed with the substantive claim, as a matter of law 'that lack of jurisdiction bars an award of attorneys fees under section 1988.'" *Senatore*, 18 F.3d at 64 (quoting *Keene Corp.*, 908 F.2d at 298). . . .

Id. at 293. Second, even assuming jurisdiction to impose § 1988 attorney fees exists, the court held a defendant is not a "prevailing party" when the dismissal is based on a lack of subject matter jurisdiction. *Id.* (concluding § 1988 attorney fees only available to a party who has prevailed on the merits). In *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000), the Seventh Circuit reached a different conclusion. Citizens for a Better Environment (CBE) brought suit against Steel for its failure to timely file reports pursuant to 42 U.S.C. § 11046(a)(1), authorizing suits against hazardous chemical facilities for a facility's failure to submit required information. *Id.* at 925. After the Supreme Court determined CBE lacked standing, on remand Steel requested an award of attorney fees pursuant to § 11046(f).[18] *Id.* The district court denied Steel's request, reasoning that if CBE lacked standing to

---

[18] 42 U.S.C. § 11046(f) provides in relevant part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. . . .

seek civil penalties, Steel must lack standing to seek attorney fees. *Id.*

The Seventh Circuit disagreed. The court began its analysis by noting, "courts that lack jurisdiction with respect to one kind of decision may have it with respect to another. A court, for example, always has jurisdiction to consider its own jurisdiction." *Id.* at 926 (citation and quotations omitted). Thus, the court framed the question as whether an exercise of jurisdiction to award attorney fees in the absence of subject matter jurisdiction over the underlying claim would run afoul of Article III. *Id.* Holding in the negative, the court distinguished between the adjudicatory authority governed by Article III and the legislative authority imposed by Article I. *Id.* at 927. Guided largely by the Supreme Court's decision in *Willy v. Coastal Corp.*, 503 U.S. 131, 117 L. Ed. 2d 280, 112 S. Ct. 1076 (1992), the Seventh Circuit acknowledged statutes such as 28 U.S.C. §§ 1919 and 1447(c)[19] specifically "permit awards of litigation expenses in suits that federal courts

---

[19] 28 U.S.C. § 1919 provides:

> Whenever any action or suit is dismissed in any district court, the Court of International Trade, or the Court of Federal Claims for want of jurisdiction, such court may order the payment of just costs.

28 U.S.C. § 1447(c) provides in relevant part:

> (c) A motion to remand the case [to the state court] on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. . . .

are not authorized to decide on the merits" and the "use of this fee-shifting power has been uncontroversial." *Id.* at 927. Further, "*Willy* held that attorneys' fees may be awarded under Rule 11 even if the case *never* came within the district court's subject-matter jurisdiction." *Id.* Thus, if the claim for attorney fees is a separate "case or controversy," the federal court may have Article III authority to determine the matter. *Id.* The court then reasoned Steel's claim for attorney fees satisfied these requirements: Steel had suffered an injury that may be redressed by the award of attorney fees. *Id.* at 926. Accordingly, the court concluded, "Article III therefore presents no obstacle to fee-shifting, whether or not the fees were incurred in proceedings that were cases or controversies under Article III." *Id.* at 928.

The Seventh Circuit next considered whether the relevant statutory authority authorized Steel's recoupment of attorney fees. Finding in the affirmative, the court analyzed the language of the statute and found Steel's request to be within its scope – a request for attorney fees in the "final order" resolving an "action brought pursuant to [42 U.S.C. 11046]." *Id.* at 929.

As the final step in its analysis, the Seventh Circuit addressed whether Steel could be deemed the "prevailing party" in the absence of a ruling on the merits of the case. *Id.* at 929-30. The court found "the alternative of limiting 'prevailing' to 'prevailing on the merits' has nothing to recommend it under either the text of the statute or the considerations that lie behind fee-shifting statutes." *Id.* at 930. Instead, the court applied the "prevailing party" standard imposed on the plaintiffs in *Texas State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 792-93, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989). *Id.* at 929. "[A]

plaintiff prevails for purposes of 42 U.S.C. § 1988 only if 'at a minimum . . . the plaintiff [can] point to a resolution of the dispute which [materially] changes the legal relationship between itself and the defendant.'" *Id.* (quoting *Texas State Teachers Ass'n*, 489 U.S. at 792). Assuming § 11046(f) uses "prevailing party" in the same way, the Seventh Circuit found the dismissal of CBE's lawsuit was a jurisdictional victory that equaled or exceeded a victory on the merits because it secured "a decision foreclosing any private plaintiff from suing about this delay or any other." *Id.* at 929.

We believe the Seventh Circuit takes the most thoughtful approach and will apply its analysis for the purposes of Praxair's request for attorney fees pursuant to 31 U.S.C. § 3730(d)(4). There is no Article III roadblock in this instance.[20] Praxair has expended significant funds in defending this protracted litigation. It claims this injury is the result of a frivolous lawsuit, an alleged injustice which may be redressed by an award of attorney fees as contemplated by the statute. The district court is not being asked to continue to consider the merits of the underlying *qui tam* case. Rather, it must determine whether Grynberg's lawsuit was or became clearly frivolous or vexatious. Moreover, the result of the district court's summary judgment decision materially changed the legal relationship between Grynberg and Praxair. Grynberg's campaign

[20] We have had but one opportunity to consider the award of attorney fees under 31 U.S.C. § 3730(d)(4). In *MK-Ferguson Co.*, we affirmed the district court's determination that subject matter jurisdiction was lacking as well as its decision to deny the defendant's request for attorney fees. 99 F.3d at 1549. We did not reach the jurisdictional parameters of the district court's authority to rule on attorney fees in that case.

to declare Praxair an entity "causing" a false claim to be made has reached final resolution. As Grynberg is now prohibited from bringing further claims on these facts, Praxair is a prevailing party.[21] Accordingly, we find subject matter jurisdiction exists to award attorney fees and proceed to review the district court's denial of Praxair's request.

B. Denial of Attorney Fees

"Under the abuse of discretion standard, the decision of a trial court will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *MK-Ferguson Co.*, 99 F.3d at 1548-49 (citation and quotation marks omitted). When determining whether a plaintiff should be ordered to pay the defendant's attorney fees, we apply the standard enunciated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). Under this standard:

> the plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. . . . [A] plaintiff should not be assessed his opponent's attorney's fees

[21] In *GHK Exploration Co. v. Tenneco Oil Co.*, applying Oklahoma law, we held the defendant was not the prevailing party because the court dismissed the plaintiff's claim for lack of subject matter jurisdiction rather than on the merits. Our decision here is not constrained by the state law limitations found in *GHK*, 857 F.2d 1388, 1391-92 (10th Cir. 1988).

> unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. . . .

Houston v. Norton, 215 F.3d 1172, 1174 (10th Cir. 2000).[22] "The term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him. . . . [A] district court may in its discretion award attorney's fees to a prevailing defendant . . . upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co.*, 434 U.S. at 421; *see also Prochaska v. Marcoux*, 632 F.2d 848, 853-54 (10th Cir. 1980).

Praxair claims Grynberg's persistence in this lawsuit was clearly frivolous after it became apparent Praxair had no responsibility or involvement with Conoco's royalty payments. The district court's order denying Praxair's request for attorney fees states:

> Section 3730(d)(4) authorizes the award of attorney's fees and expenses "if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for

---

[22] The more stringent test for the recovery of attorney fees by a defendant is based on the distinction between the equitable considerations adhering to the parties. *Christianburg Garment Co.*, 434 U.S. at 418. A prevailing plaintiff is "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority" and the district court is awarding counsel's fees "against a violator of federal law." *Id.* (quotations omitted). A successful defendant, on the other hand, must demonstrate that the plaintiff has misused his statutory privilege and distorted the intent of the legislation. *Id.* at 419-20.

> the purposes of harassment." While the claims in this case were properly dismissed on summary judgment, review of the record in this case leaves me unable to find that Relator's Complaint was clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment.

(R. Supp. App. at 95-96.) Grynberg contends we must assume the district court considered all relevant theories because it set forth the correct standard and referenced its review of the entire record. We disagree. The district court did not hold a hearing on this matter and the truncated order provides no guidance as to whether Praxair's theory was considered.

We recognize that the *Christiansburg* standard is "a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff." *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1203 (10th Cir. 2000). However, the Supreme Court has instructed that the district court review the entire course of the litigation in making this determination. *Christiansburg Garment Co.*, 434 U.S. at 421-22. In order to provide meaningful appellate review, we require an articulation of the district court's rationale. *See Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1177 (9th Cir. 1996).

The district court made a specific factual finding that:

> There is no evidence indicating any Praxair involvement in royalty calculation, reporting and payment other than providing accurate volume and price data to Nielson pursuant to the Agreement. Praxair has not assisted Nielson in interpreting or implementing the royalty regulations. Nor does Praxair supply any other information or assistance. Praxair does not even

> receive copies of the royalty reports submitted by Nielson.

Grynberg, 207 F. Supp. 2d at 1173-74. From these facts the district court rendered its legal conclusion that:

> Given that (I) the challenged royalty practices were approved both before and after these representations, (ii) the government knew the extent of venting based on knowledge of both wellhead and tailgate volumes and (iii) the government approved the venting and royalty practices even after learning that ice plant vapors were not being recycled, there is no basis for any inference that these LCC and Praxair statements were made for the purpose of reducing royalty obligations. Moreover, Grynberg argues that wellhead volumes and an alternative CO_2 market value should have been used to calculate royalties. The wellhead measurements and the decision of what value to use when calculating royalties were always controlled by Conoco and Nielson. *Praxair was thus totally irrelevant to the royalty underpayments that Grynberg alleges.*

Id. at 1186 (emphasis added). Because the timing of Grynberg's discovery of these facts is contrary to a finding that he could reasonably believe his claim against Praxair had a scintilla of merit throughout the litigation, we must remand to the district court for further discussion and findings. *Houston,* 215 F.3d at 1175; *Goichman v. City of Aspen,* 859 F.2d 1466, 1471 (10th Cir. 1988).

IV. CONCLUSION

Grynberg failed to establish subject matter jurisdiction under the FCA to sustain his reverse false claim

action. While the district court, nonetheless, maintains subject matter jurisdiction to award attorney fees, the district court failed to provide sufficient information to afford a review of the denial of attorney fees. Accordingly, the dismissal of Grynberg's claim is **AFFIRMED**. The denial of attorney fees is **REVERSED** and the case **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED JUNE 6, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 98-D-16

UNITED STATES OF AMERICA ex rel.
JACK J. GRYNBERG

Relator,

v.

PRAXAIR, INC. and
NIELSON & ASSOCIATES, INC.,

Defendants.

ORDER
(Filed Jun. 6, 2001)

THIS MATTER is before the Court Defendant Praxair Inc.'s Motion to Review or Award Costs filed May 18, 2001. On March 28, 2001, I granted summary judgment in favor of Defendants and dismissed this case. The March 28, 2001, Order of Dismissal provided that "each party shall bear its own attorney's fees. Defendants, as the prevailing parties, shall have their costs." Defendant Praxair submitted in its Bill of Costs a request for taxation of expert witness fees in the amount of $27,276. The Clerk of the Court awarded $40 for each day that Praxair's experts were deposed (a total of $160) but otherwise declined to award these fees. Through its Motion, Praxair seeks

taxation of the remaining $27,116 of expert witness fees outlined in its Bill of Costs.

Section 1920, 28 U.S.C., authorizes taxation of costs for witnesses. Section 1831 establishes a *per diem* amount of $40 for witness fee recovery. A district court may not, as taxable costs under § 1920, award expert witness fees in excess of statutory per diem fee under § 1821. *See generally Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-442 (1987); *Hull v. United States*, 978 F.2d 570, 571-573 (10th Cir. 1992). Praxair therefore argues that its expert witness fees should be awarded, not pursuant to §§ 1821-1920, but pursuant to Fed.R.Civ.P. 26(b)(4)(C).

Rule 26(b)(4)(C) provides that "[u]nless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision." Praxair argues that this rule establishes "a separate and independent basis to recover the costs associated with expert witness responses to discovery." Considering this same argument, the Court in *Hansen v. Sea Ray Boats, Inc.*, 160 F.R.D. 166 (D.Utah 1995), held that

> The Supreme Court has stated that "Congress has made its intent plain in its detailed treatment of witness fees [in 28 U.S.C. § 1821]." *Crawford*, 482 U.S. at 444-45. This Court relies on the explicit language of the comprehensive provisions of 28 U.S.C. § 1821, and the binding decisions of the Tenth Circuit and the Supreme Court, in its determination that recoverable expert witness fees are limited to $40 per day.

Id. at 167-68 & n.2. I find *Hansen* persuasive and will therefore DENY Praxair's Motion. It is hereby

ORDERED that Defendant Praxair Inc.'s Motion to Review or Award Costs filed May 18, 2001, i[illegible]ENIED.

DATED at Denver, Colorado, this 5th day of June, 2001.

BY THE COURT:

/s/ Wiley Y. Daniel
Wiley Y. Daniel
United States District
Court Judge

APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED APRIL 13, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 98-D-16

UNITED STATES OF AMERICA ex rel.
JACK J. GRYNBERG

Relator,

v.

PRAXAIR, INC. and
NIELSON & ASSOCIATES, INC.,

Defendants.

ORDER
(Filed Apr. 13, 2001)

THIS MATTER is before the Court Defendant Praxair Inc.'s Motion to Recover Attorneys' Fees and Expenses filed April 11, 2001, and Defendant Nielson & Associates, Inc.'s Motion Motion [sic] to Recover Attorneys' Fees and Expenses filed April 11, 2001. On March 28, 2001, I granted summary judgment in favor of Defendants and dismissed this case. The March 28, 2001, Order of Dismissal provided that "each party shall bear its own attorney's fees. Defendants, as the prevailing parties, shall have their costs." Defendants now seek an award of attorney's fees pursuant to 31 U.S.C. § 3730(d)(4), and in doing so, seek reconsideration of my prior Order.

Section 3730(d)(4) authorizes the award of attorney's fees and expenses "if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." While the claims in this case were properly dismissed on summary judgment, review of the record in this case leaves me unable to fine [sic] that Relator's Complaint was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. Accordingly, it is

ORDERED that Defendant Praxair, Inc.'s Motion to Recover Attorneys' Fees and Expenses filed April 11, 2001, is DENIED. It is

FURTHER ORDERED that Defendant Nielson & Associates, Inc.'s Motion to Recover Attorneys' Fees and Expenses filed April 11, 2001 is DENIED.

DATED at Denver, Colorado, this 12th day of April, 2001.

BY THE COURT:

/s/ Wiley Y. Daniel
Wiley Y. Daniel
United States District
Court Judge

APPENDIX D – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED APRIL 13, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 98-D-16

UNITED STATES OF AMERICA, ex rel.
JACK J. GRYNBERG

Plaintiff,

v.

PRAXAIR, INC. &
NIELSON & ASSOCIATES, INC.,

Defendants.

JUDGMENT
(Filed Apr. 13, 2001)

Pursuant to and in accordance with the Order filed on April 12, 2001 by the Honorable Wiley Y. Daniel, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that Defendant Praxair, Inc.'s Motion to Recover Attorneys' Fees and Expenses filed April 11, 2001, is denied. It is

FURTHER ORDERED that Defendant Nielson & Associates, Inc.'s Motion to Recover Attorneys' Fees and Expenses filed April 11, 2001, is denied.

DATED at Denver, Colorado this 12th day of April, 2000. [sic]

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

s/ Stephen P. Ehrlich
Stephen P. Ehrilich
Chief Deputy Clerk

APPENDIX E – ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED MARCH 28, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 98-D-16

UNITED STATES OF AMERICA, ex rel.
JACK J. GRYNBERG

Plaintiff,

v.

PRAXAIR, INC. & NIELSON & ASSOCIATES, INC.,

Defendants.

ORDER and JUDGMENT

THIS MATTER is before the Court on Defendant Nielson & Associates, Inc.'s Motion for Summary Judgment filed April 6, 2000, and Defendant Praxair, Inc.'s Motion for Summary Judgment filed April 6, 2000. A hearing on these motions was held March 2, 2001; at that time, I took the motions under advisement. After extensive review of the record,[1] applicable law, and argument of the parties, I find that the motions should be GRANTED.

---

[1] Citations to evidence presented at the oral argument or in prior written submissions will be referenced using the following abbreviated citation forms: Praxair's Summary Judgment Hearing Notebook, ("PHN Tab ___, with a cross reference to the corresponding prior motion and/or response"); exhibits that accompanied Praxair's Motion for Summary Judgment ("Praxair Mem. Ex. ___"); exhibits that accompanied Praxair's Reply to Grynberg's Combined Response to the Motion for

(Continued on following page)

FINDINGS OF FACT

Procedural Background

1. Plaintiff Jack J. Grynberg ("Grynberg") commenced this action on January 7, 1998, as a qui tam relator under the U.S. False Claims Act (31 U.S.C. § 3729, et seq., "FCA" or "Act"). Grynberg alleges that Defendant Praxair, Inc. ("Praxair") and Nielson Associates, Inc. ("Nielson") are liable under the so-called "reverse false claim" provision at 31 U.S.C. § 3729(a)(7), for having made or caused to be made false records or statements for the purpose of decreasing royalty payments due under certain Federal leases.

2. Grynberg's initial Complaint, filed January 7, 1998, alleged that Praxair and Nielson had "knowingly . . . underreported, or caused others to underreport, the value of the natural CO_2 gas produced from" various Federal leases in the McCallum field in Northern Colorado. (Complaint ¶ 1.)

3. In an Amended Complaint filed October 23, 1998, Grynberg modified his allegations regarding gas undervaluing practices and added allegations that gas volume was underreported. (Amended Complaint, ¶¶ 1, 10, 17-20, 22-25.)

Summary Judgment ("Praxair Reply Ex. ___"); exhibits that accompanied Grynberg's Combined Response to Defendants Motions for Summary Judgments, Statement of Additional Disputed Facts and Exhibits ("G'berg Opp. Ex. ___"); exhibits that accompanied Grynberg's Supplemental Brief ("G'berg Supp. Ex. ___"); transcript of March 2, 2001, hearing ("Hearing ___"). Not all record evidence already before the court has been cited, particularly as to issues treated fully in prior fact statements and undisputed matters.

4. Pursuant to the Act, Grynberg's Complaint was filed under seal and remained sealed until December 1998, when the U.S. Department of Justice advised the Court that the Government would not intervene. *See* 31 U.S.C. § 3730(b)(2). At that time, the seal was lifted and the Amended Complaint was served on the defendants.[2]

5. After this Court denied Motions to Dismiss filed by both Praxair and Nielson, the parties engaged in lengthy discovery proceedings. Thereafter, on March 2, 2001, the Court heard oral argument on summary judgment motions filed by both Praxair and Nielson. Exhaustive briefs and exhibit submissions by all parties have provided the Court with an extensive factual record of the practices at issue in this case, as well as the Government's knowledge of and involvement in the defendants' activities.

The Defendants and Their Contracts

6. Defendant Nielson is a small, privately held Wyoming corporation that produces and sells oil, hydrocarbon liquids and CO_2 from the "McCallum" fields in northern Colorado pursuant to leases with the U.S. government.

7. The McCallum leases were originally entered into between Conoco, Inc. and the U.S. government. For many years, Conoco extracted and sold oil from the McCallum fields and simply vented to the atmosphere raw CO_2 gas that was produced in conjunction with the oil. There is no proximate pipeline that can transport CO_2 gas from the

[2] The initial Complaint was never served.

McCallum fields to locations where it can be sold and, for most of the history of the leases, there were no customers for the CO_2. It is undisputed that Conoco's CO_2 venting associated with oil production was known to and approved by Federal regulatory authorities, and that activity is not challenged in this action.

8. Conoco entered into a June 3, 1983, "Agreement for the Sale of Carbon Dioxide" ("Agreement") with Liquid Carbonic Corporation ("LCC"). (Praxair Mem. Ex. 13) Under the Agreement, LCC was obligated to construct a plant to process raw CO_2 gas produced and delivered by Conoco in order to purify and convert it into liquid CO_2. The gas produced by Conoco contained various impurities, including hydrocarbons and other non-CO_2 gases, which must be removed in order to yield 99.99+% pure "food-grade" CO_2 liquid suitable for beverages, food processing and other uses.

9. The Agreement provided that Conoco would be paid based on a price per ton of finished product shipped from the plant, with LCC reporting to Conoco the quantity shipped each month. (PHN Tab D, Agreement at §§ VI.A. and VIII.)

10. The base price per ton under the Agreement was subject to adjustments. The price would be adjusted annually according to the market prices received by LCC for its sales of the plant's finished product. (PHN Tab D, Agreement at § VI.A.) The monthly price paid was also subject to adjustments based on the quality of the raw CO_2 gas delivered to the plant by Conoco. One adjustment would reduce the price when additional oxygen was required to process the raw gas "in the event any of the hydrocarbons, other than methane, rise above the levels

specified" in the Agreement. (PHN Tab D, Agreement at § IX.C.[3])

11. The Agreement provided that LCC would normally return to Conoco 80% of all vent gases produced from the processing plant, and that Conoco would provide the pipeline to permit the return of those gases. (PHN Tab D, Agreement at § V.E.) Conoco was charged in the Agreement with responsibility to pay all royalties on CO_2 delivered to LCC. (PHN Tab D Agreement at § XIV.A.)

12. In 1994, Nielson purchased certain assets from Conoco, including the McCallum leases, and succeeded Conoco as seller under the Agreement.

13. In 1996, LCC merged into Praxair, making Praxair the Buyer under the Agreement.

14. It is undisputed that neither Praxair, nor its predecessor LCC, have ever been affiliated with Nielson or Conoco. Nor has Praxair or LCC ever been a party to the McCallum leases. (PHN Tab C.)

15. It is also undisputed that Nielson and Praxair (and formerly LCC) have no material relationship other than the Agreement. (PHN Tab C.) There is no allegation or evidence of any conspiracy, side-deal or other arrangement among the defendants.

---

[3] This provision was revised and simplified as part of a November 1, 1988, Amendment to the Agreement, but continued the same practice of adjusting the base price depending on the quality of oxygen delivered to the plant. (Praxair Mem. Ex. 34 at 3-4.)

Government Communications, Investigations and Approvals

16. On October 22, 1984, Conoco transmitted the Agreement to the Department of Interior's Minerals Management Service ("MMS") and asked that MMS approve the arrangement with LCC. Conoco explained that it would supply the raw CO_2 to LCC for processing, and receive payment based on a price per ton of finished product shipped from the plant. Conoco also advised that its plan was for plant vent gases to be returned, "run through a separator to remove any available [hydrocarbon] condensate for sale," and reinjected into one of the wells. Conoco's transmittal to the MMS included a schematic showing that some gas would be flared from LCC's plant, while some gas would be returned to a Conoco separator and then reinjected. (PHN Tab K, Praxair Mem. Ex. 58.)

17. Alerted to the fact that the volume of Conoco's CO_2 gas production would be measured for royalty purposes based on the LCC plant's output – or, in other words, at the plant "tailgate" – the MMS wrote Conoco on March 14, 1985 and inquired about the impact on royalties relative to volume measurement at the wellhead: "We are concerned that, if royalty is to be paid on the volume of gas leaving the plant, there could be significant differences, due to plant losses, from the volumes the [wellhead] allocation meters indicate." (PHN Tab L, Praxair Mem. Ex. 60.)

18. On March 22, 1985, Conoco responded to the March 14th MMS letter (and to a later phone conversation with MMS representatives) and explained that the plant's vent gas losses would diminish once operations stabilized. Conoco also advised that there would nevertheless continue

to be unavoidable CO_2 gas loss because of the quality of the raw CO_2 delivered to the plant and the anticipated plant efficiency: "only about 76% of the produced gas can actually be liquefied and sold as liquid CO_2." Conoco reiterated its plan, "once the plant is on stream," to pipe vent gas from the plant through a separator and then reinject remaining gas. Conoco noted that the arrangement with LCC finally provided a means to sell CO_2 reserves previously shut-in or simply flared in connection with oil production. (PHN Tab M, Praxair Mem. Ex. 61.)

19. MMS approved Conoco's arrangement with LCC on April 4, 1985.[4] More specifically, MMS acknowledged and accepted the pricing provisions in the Agreement, both the base price and the adjustments related to market prices and CO_2 quality. After noting that "the contract contains provisions for decreased prices in the event[s] any hydrocarbons, other than methane, exceed specified levels . . . ". (i.e. the oxygen use adjustment), MMS stated that "the price reduction provisions are accepted as part of the arm's length contract." MMS directed that royalties must never be based "upon less than the gross proceeds accruing to Conoco from the sale of the CO_2." To that end, MMS concluded that no processing allowances could be deducted from the gross proceeds, and that royalties would be due on additional "up-front" payments or tax and/or royalty reimbursements. The MMS findings noted Conoco's plan to recover plant vent gases, separate condensates, and reinject gas remaining. (Praxair Mem. Ex. 14, Vanderwal Dep. at 172:1-172:4; Grynberg Opp. Ex. R-19, Vanderwal Dep. at 299:19-300:19.) Ultimately, Conoco did not install

[4] MMS advised Conoco to secure approval of its "production reporting sequence" from the Bureau of Land Management ("BLM").

the piping necessary to permit return to it of all plant vent gas and did not reinject that gas into a well. MMS also found that Conoco and LCC were unaffiliated, that the Agreement was "arms-length," and that the arrangement with LCC "created the only market for CO_2 in the area." (PHN Tab N, Praxair Mem. Ex. 59.)

20. On November 13, 1985, MMS wrote to BLM concerning an MMS audit of Conoco's CO_2 production from the McCallum leases. MMS noted: "According to Forms 9-329 for the production months October 1984 through August 1985, the majority of CO_2 production is being vented." MMS asked that BLM provide information regarding Conoco's authority to vent this CO_2.[5] The Form 9-329 reports confirmed substantial gas venting, without any gas injection. (PHN Tab O, Praxair Mem. Ex. 43.)

21. The BLM responded to MMS in a December 23, 1985, Memo and advised that Conoco's gas venting was previously approved in April 1980. BLM also said that, with regard to the gas venting MMS described, "We do not wish to refute the approval granted by the Conservation Division in April 1980." (PHN Tab P, Praxair Mem. Ex. 63.)

22. The record reflects a detailed "Production Accountability Inspection" by BLM of Conoco's CO_2 production in the McCallum field for June 1987. During this inspection, BLM representatives reviewed the Agreement and noted that "Conoco's measurement and reporting

---

[5] In general, MMS deals with matters relating to royalty calculations and payments, including gas valuation, while BLM addresses gas production issues, including the measurement location for royalty purposes. *See, e.g.* 30 C.F.R. § 206.152; 206.154(a)(1).

methods were approved by the [BLM's] Craig District Office by letter dated July 1, 1985."[6] Conoco employees were interviewed to clarify methods and procedures, and production documentation was reviewed. BLM representatives visited and inspected Conoco's facilities three times. The BLM's report notes that production ancillary to oil production was either flared or, upon demand, delivered to the LCC plant, while other CO_2 was delivered to the plant from CO_2 wells. BLM also acknowledged that the LCC plant vents gas without metering, in addition to "shrinkage" (i.e. other gas losses) from Conoco's operations. Moreover, BLM's report explained that gas returned from the LCC plant to Conoco is passed through a separator to extract hydrocarbons, with excess gas vented (i.e. not reinjected), and that "Conoco has approval to flare [that] waste gas." (PHN Tab Q, Praxair Mem. Ex. 62.)

23. In 1988, Conoco sought BLM approval to alter various gas production activities, including addition of CO_2 supply to the LCC plant from a well in the South McCallum unit (previous activity and approvals had all related to wells in the McCallum unit). (PHN Tab R & PHN Tab W, Praxair Mem. Ex. 35.) In response to BLM inquiries, Conoco again described the gas production sequence. Conoco explained that CO_2 would be delivered to the LCC plant for processing, that effluent gas returned to Conoco from the plant would be passed through separators to remove liquids, and that excess gas remaining "will be vented." Conoco also advised that gas venting volumes are estimated by calculating the difference between gas

[6] Although this July 1, 1985, letter has not been located, it appears to respond to the MMS April, 1985, direction that Conoco secure BLM's approval of its production reporting sequence.

volumes produced at the wellhead and gas volumes measured at the LCC plant tailgate (i.e. volumes sold), which "volumes are reported on a monthly basis to the Colorado Oil & Gas Conservation Commission ("COGC") on COGC Form 7." (PHN Tab S.)

24. The state of Colorado Department of Revenue, Mineral Audits Section, audited Conoco's October 1, 1982-December 31, 1995 Colorado oil and gas production for the United States Department of the Interior.[7] The Audit Report explained that auditors verified natural gas volumes reported against Conoco source documents, tested values reported for royalty purposes against contract terms, and verified that Conoco had used "correct royalty rates and computed royalties in compliance with the lease terms and federal regulations." After two adjustments unrelated to the McCallum field CO_2 production, the audit report concluded: "We consider Federal royalties for the State of Colorado to be correct for the audit period ending December 31, 1995." (PHN Tab V.[8])

25. In 1992, LCC added a dry ice manufacturing facility to its plant. Because the plant is on land leased from the Federal government, LCC sought permission from the BLM to construct that facility. In a September 1, 1992, memo, LCC advised (among other things) that CO_2

---

[7] Section 205 of the Federal Oil and Gas Royalty Management Act of 1982 authorized the Secretary to contract with states to audit royalty payments from Federal leases within the states.

[8] This audit covered the McCallum leases. (Compare Tab N at N01563 (Section 1 listing leases) with Tab V. at MMS 00855-858 (line Nos. 9, 40, 41, 42, 53 and 129).) Although the audit did result in adjustments related to processing allowances, those adjustments were unrelated to the McCallum leases involving the CO_2 production. (*Id.* at Tab V in the columns showing adjustments.)

vapor released from the dry ice machinery would be piped back into the main CO_2 plant. There is no evidence that this was not LCC's intent when this statement was made. The plan to recycle the CO_2 vapor, however, was later abandoned as uneconomical. The government was then made aware that the vapor from the dry ice plant was vented and not recycled. (Praxair Mem. Ex. 14, Vanderwal Dep. at 78-81, 220-221; Praxair Mem. Ex. 42, Dalton Dep. at 227-229; Grynberg Opp. Ex. R-26; Praxair Reply Ex. 9, Dalton Declaration.)

26. About once a year, BLM conducts a detailed Production Accountability Inspection of the production activity in the McCallum fields. During these inspections, BLM requests and receives from Nielson (and previously Conoco) documents which disclose the actual wellhead production volumes (as distinguished from the plant "tailgate" volumes reported for royalty purposes). (PHN Tab Y, Praxair Mem. Ex. 64; PHN Tab Z, Praxair Mem. Ex. 3, Fleetwood Depo. at 53:17-25; PHN Tab AA, Praxair Mem. Ex. 5, Williams Depo. at 212:3-23.)

27. In 1996, BLM began making inquiries of Nielson about its royalty calculation and reporting practices. In response, Nielson supplied BLM with numerous documents describing its practices. This included a sample of the worksheet Nielson uses to calculate the gas value and volume for royalty purposes, which reflected the differences between total wellhead production and the lesser plant tailgate "sold" volumes reported for royalty purposes (i.e. excluding vented gas volumes). The worksheet also reflected the calculation of price whereby the price per ton is reduced based on CO_2 quality. (PHN Tab BB at BLM 0166, Praxair Mem. Ex. 65.)

28. Nielson also provided an updated schematic showing the wells used to supply CO_2 and piping configurations to and from the plant. The schematic alludes to "shrink" at the plant, but also shows the originally anticipated gas reinjection line with the notation: "reinjection line by design currently being flared." (PHN Tab CC, Praxair Mem. Ex. 66.)

29. In addition, Nielson provided a schematic of the plant, which by then had been taken over by Praxair. The plant schematic shows that vent gas leaves the plant where liquid CO_2 is produced, and also escapes as vapor from the dry ice manufacturing facility.[9] (PHN Tab EE, Praxair Mem. Ex. 46.)

30. On August 22, 1996, MMS issued to Conoco and Nielson an "Order to Comply" pursuant to 30 C.F.R. § 206.154, charging them with having incorrectly reported production and royalties from McCallum wells. MMS explained: "We determined that the production is being reported using an unauthorized off-lease measurement point. Because of the unauthorized measurement point being at the tailgate of the CO_2 plant, royalty bearing volumes are not being accounted for." (PHN Tab FF, Praxair Mem. Ex. 67.)

31. Nielson, which by then had taken over from Conoco, appealed the Order to Comply, noting its understanding that CO_2 volume measurement at the plant

---

[9] The ice plant vent was labeled "vapor CO_2", but the responsible BLM representative confirmed at deposition BLM's understanding that this indicated a vent. (PHN Tab KK at 67, 204, Praxair Mem. Ex. 3, Fleetwood Depo. at 67:10-13 & 204:9-13.)

tailgate had been previously approved in November 1988. (PHN Tab GG, Praxair Mem. Ex. 68.)

32. BLM representatives met subsequently with representatives of Praxair, Nielson and Conoco. Also attending that meeting was Ed Calvert of Nucor. Nucor had an ownership interest in the leases operated by Nielson, but has not been shown to have any other involvement with, or connection to, the gas production or royalty activities at issue. BLM's questions and concerns about the "tailgate" measurement of gas volumes for royalty purposes were addressed at that meeting. In an October 21, 1996, follow-up letter to BLM, Nielson's Chief Operating Officer noted that at the meeting Praxair had described the operation of its plant, the use of CO_2 gas in its processes that result "in a 20-30% reduction in the eventual quantity of pure CO_2 available for sale", and the variables that can influence the extent of the CO_2 used in the plant processing. He also noted that, at the meeting, BLM confirmed its prior approval of plant tailgate volume measurement for royalty purposes with regard to McCallum unit production, but that approvals for South McCallum production were not clear regarding plant tailgate measurement. At BLM's suggestion, Nielson requested formal approval for plant tailgate measurement for both McCallum and South McCallum CO_2 production, retroactive to November 28, 1988. (PHN Tab HH, Praxair Mem. Ex. 69.)

33. BLM thereafter confirmed that it was "comfortable with the procedures that are being used to measure, process, and maximize recovery of the CO_2 produced by these [McCallum] units." BLM approved the off-lease plant tailgate measurement for both McCallum and South McCallum CO_2 production. (PHN Tab II, Praxair Mem. Ex.

70.) MMS thereupon withdrew its Order to Comply, closed Nielson's appeal and "determined that Nielson & Associates, Inc., are now in regulatory compliance." (PHN Tab JJ, Praxair Mem. Ex. 71.)

34. The BLM official responsible for approving operations involving the McCallum Units, Mr. Kirk Fleetwood, testified at deposition that, based on BLM's 1987 Production Accountability Inspection, BLM understood that the LCC plant was venting gas without metering, but did not consider that a problem. He also testified that BLM was aware that the gas reinjection initially represented by Conoco did not go forward, with returned gas instead being vented, and that this difference in gas disposition was approved by BLM. (PHN Tab KK, Fleetwood Depo. at 14-15, 43, 150-151, Praxair Mem. Ex. 3.)

35. MMS Chief of Enforcement Kenneth Vogel, by sworn declaration, stated that:

> On at least two separate occasions, the MMS has reviewed the original and amended contract between Conoco and Liquid Carbonic and their successors, Nielson and Praxair. These reviews occurred in 1985 and 1998. In both reviews, MMS determined, based on the available information, that the contract was an arm's-length contract, as that term is defined by MMS regulations, and that the base price received under it was acceptable for royalty purposes, provided that royalty is never based on less than the gross proceeds accruing to the lessee (Conoco or Nielson) from the sale of the carbon dioxide. In these reviews, MMS determined that royalty has been paid on the basis of the arm's-length contract price.

(PHN Tab LL, Praxair Mem. Ex. 11.)

36. BLM Petroleum Engineering Technician James Wood, who has been responsible for several production inspections of the McCallum fields, stated in a sworn declaration as follows:

> BLM is aware that the Agreement calls for payment for carbon dioxide produced based on finished product shipped (now both liquid CO_2 and dry ice) from the Praxair (formerly LCC) Plant. Conoco's measurement and reporting methods initially were approved for the McCallum Unit gas by the BLM Craig District Office in a letter dated July 1, 1985. BLM has understood since the Agreement's inception that the tailgate measurement and royalty reporting method would result in royalties not being paid on lost gas (including, among other things, the carbon dioxide, nitrogen, and hydrocarbon gas content contained in the lost gas) during processing at the Plant.
>
> * * *
>
> On three occasions during my tenure with BLM I have conducted Production Inspections of varying levels of intensity of the carbon dioxide production from the McCallum Fields to ensure, among other things, that Nielson was properly measuring and reporting the correct production volumes of gas produced from the McCallum Fields. At least one of those inspections (the 1996 Inspection) resulted in further investigation of the Nielson carbon dioxide production and Nielson's underlying Federal reporting and royalty payment obligation by BLM and the United States Department of the Interior's Minerals Management Service ("MMS"). Based on my Production Inspections, I believe that Nielson has

complied fully with its measurement and production reporting obligations.

* * *

BLM was aware that the [Praxair] Plant was losing some amount of gas when making both the food grade liquid carbon dioxide and the dry ice and that this venting was covered under the approval for CO_2 venting granted . . . on 4/15/80.

* * *

BLM was aware that Praxair's Plant lost, in varying monthly amounts, inlet gas when producing food grade liquid carbon dioxide and dry ice and that Nielson, based on the tailgate measurement method, was not paying royalties on the gas lost.

* * *

I have performed several Production Inspections of various levels of intensity since 1996 to ensure that Nielson properly has accounted for and reported the gas produced from the McCallum Fields. Based on my inspection, I believe that Nielson has properly measured and accounted for the gas produced from the McCallum Fields.

* * *

As part of my investigation, I have reviewed analyses of the quality and quantity of gas produced from the McCallum Fields. My quantity investigations have involved comparisons of the volume of the gas produced from the wells as regularly reported to the government on Nielson's 3160s. I am satisfied that Nielson has

> properly reported the production volumes of the McCallum fields carbon dioxide.

(PHN Tab MM; Praxair Mem. Ex. 12.)

37. On June 26, 2000, Nielson submitted to MMS an "Extension Agreement" covering Nielson's continued sale of CO_2 to Praxair from the McCallum fields. Although the Extension Agreement is substantially similar to the Agreement originally entered into between Conoco and LCC, it is modified to account for various changes in actual practices (i.e. addition of dry ice production, reduction in returned gas volumes, recognition of venting losses, etc.). Noting the pending Grynberg action, Nielson asked that MMS confirm its continuing approval of Nielson's CO_2 production, sales and royalty activity, as reflected in the Extension Agreement. The Extension Agreement would take effect upon MMS approval. (PHN Tab PP, Praxair Reply Ex. 3.) The Extension Agreement included the following provisions:

> 4.4. During the production of Finished Product, Praxair's Plant produces vent gases and both parties agree that under normal operating conditions there may be significant and substantial losses of the CO_2 stream incurred in order to produce Finished Product. The amount of losses will vary with the composition of the CO_2 stream, but they may from time to time exceed fifty percent (50%) of the volume of the CO_2 stream which is delivered by Seller to Praxair's Plant . . .
>
> * * *
>
> 8.3. To simplify responsibility and payments for the hydrocarbons, other than methane, in the CO_2, it is agreed that Praxair shall pay for the first 37.5 pounds of oxygen per Ton of Finished

> Product used to oxidize the impurities and Seller shall pay for the oxygen in excess of 37.5 pounds per Ton of Finished Product. On or before the 20th day of each month, Praxair shall send a statement to Seller setting forth the quantity of Finished Product produced and the amount of excess oxygen used during the preceding month, and the current oxygen price for such quantities. Such excess oxygen charges shall be deducted from payments for Finished Product thus reducing the price received for CO_2 by Seller.

(PHN Tab QQ, Grynberg Opp. Ex. R-20.)

38. MMS responded on November 3, 2000, once again approving Nielson's royalty practices. Specifically, MMS stated:

> Relationship Between Nielson and Praxair . . .
>
> Therefore, Nielson and Praxair are not affiliated under 30 C.F.R. § 206.151 (1999).
>
> The determination of whether a contract is arm's-length is a two-part test. That is, not only must the contract be between two opposing economic interests regarding that contract. We did not find that Nielson and Praxair share employees or facilities or that the companies have identical or substantially identical business or economic interests (e.g., share profit or loss risks). *See Creme Mfg. Co. Inc. v. United States,* 492 F.2d 515 (5th Cir. 1974.) Therefore, we conclude, subject to future audit and review, that the contract between Nielson and Praxair is arm's length.

Royalty Measurement Point

By letter dated November 14, 1996, BLM determined the tailgate of the Praxair Plant as the approved point of measurement for royalty purposes. Therefore, Nielson must pay royalties based on the volume and quality of production at the royalty measurement point.

Royalty Valuation

. . .

Since the formula price is based upon what Praxair ultimately received for the finished carbon dioxide product, using this formula calculates a reasonable price for carbon dioxide produced by Nielson from the McCallum and South McCallum Fields in Jackson County, Colorado . . .

(PHN Tab RR, Praxair Reply Ex. 4.)

Royalty Payment Practices

39. Nielson's actual royalty payment practices (and Conoco's) are not disputed. Nielson has received each month data from Praxair (and previously LCC) regarding the volume in tons of finished product shipped from the plant.[10] Praxair also reports the volume of oxygen used each month in producing the finished product. (PHN Tab G, Praxair Mem. Ex. 65.) In addition, Praxair provides Nielson the pricing information regarding the annual price adjustment based on Praxair's sales. There is no allegation

[10] Historically, this was only liquid CO_2, but later also included dry ice once the dry ice facility was added.

or evidence challenging the accuracy or truth of the data Praxair submits to Nielson.

40. Nielson each month calculates the payment due from Praxair by applying the Agreement's pricing provisions (including price adjustments) to the data supplied by Praxair, and then issuing an invoice for that amount to Praxair. (PHN Tab H, Praxair Mem. Ex. 65.) There is no allegation or evidence challenging the accuracy or truth of Nielson's invoices to Praxair in terms of adherence to the Agreement's terms and the relevant measurement data.

41. Praxair pays Nielson the invoiced amount. Nielson then remits royalties to the MMS by applying the royalty percentage due under the leases to the gross proceeds received from Praxair. Under regulations governing gas produced from Federal leases, royalties are ordinarily paid based on the gross proceeds received when the gas is sold pursuant to an "arms-length" contract. 30 C.F.R. § 206.152(a)(1), (b)(1)(i); 206.153(a)(1), (b)(1)(i).[11] It is undisputed that Nielson has always paid royalties based on the gross proceeds it receives from Praxair pursuant to the Agreement.

42. There is no evidence indicating any Praxair involvement in royalty calculation, reporting and payment other than providing accurate volume and price data to Nielson pursuant to the Agreement. Praxair has not assisted Nielson in interpreting or implementing the royalty regulations. Nor does Praxair supply any other information or assistance. Praxair does not even receive copies of the royalty reports submitted by Nielson. (PHN

[11] Whether the gas in this case is viewed as "processed" or "unprocessed" is not material to the analysis.

Tab I, Praxair Mem. Ex. 5, Williams Depo. at 69: 7-21, 262:22-263:12.)

Relator Grynberg's Involvement

43. Grynberg is essentially a stranger to the defendants and their business activities. He was not employed by or in any way associated with them and thus did not institute this action based on first-hand information gained as an "insider."

44. Grynberg reportedly made inquiries of Praxair sales representatives regarding possible CO_2 purchases and, unsatisfied with the prices quoted, contacted representatives of Nielson. He claims to have been told by Nielson's officers that Praxair deducts 30% of the CO_2 volume that Nielson delivers and then pays only about $0.24 per mcf on the balance, on which Nielson then pays royalties (Nielson's witnesses dispute Grynberg's account of their conversations). (PHN Tab VV at ¶¶ 7-8, Grynberg Opp. Ex. R-1.)

45. Grynberg then conducted his own investigation, which reportedly included the following: (i) having his employee glean pricing information from public COGCC records and Praxair customers; (ii) examining photos of the plant's exterior taken by his employee; (iii) examining published records of the gas volumes Nielson reported to the MMS; (iv) obtaining information from Federal regulatory personnel; (v) obtaining information about operations at other CO_2 plants. (PHN Tab VV at ¶¶ 10-17, Grynberg Opp. Ex. R-1.)

46. Grynberg's counsel wrote to the U.S. Attorney for Colorado and to the U.S. Attorney General on January 9,

1998, transmitting the complaint filed against Praxair and Nielson, as well as "copies of all of the material evidence and information which Mr. Grynberg possesses relating to the substantive issues alleged in the Complaint." (PHN Tab XX, Praxair Reply Ex. 15.) There is no documentation indicating that Grynberg communicated the allegations raised in this action to any Federal government representative prior to the time that he filed his complaint.[12]

47. In an affidavit filed in response to the Motions for Summary Judgment, Grynberg states that in December, 1997, he faxed draft versions of his complaint to Mr. Vogel at the MMS and to an attorney at the Department of Justice ("DOJ"), and discussed his allegations and theories with them. (PHN Tab VV at ¶¶ 19-20, Grynberg Opp. Ex. R-1.) Mr. Vogel in his sworn declaration, however, stated that his conversations with Grynberg related to allegations in the First Amended Complaint, which was filed more than nine months after the initial complaint.[13] (PHN Tab LL at ¶¶ 3, 5, Praxair Mem. Ex. 11.) During his deposition, taken in June, 1999, 18 months before the more recent affidavit, and thus closer in time to the events, Grynberg could not recall whether he had discussed his allegations with Mr. Vogel before filing the suit.

---

[12] *See* infra note 23.

[13] The DOJ attorney Mr. Grynberg alludes to, Mr. Terlip, is deceased. In his letter to the Attorney General, however, Grynberg's attorney noted that the DOJ attorney was familiar with allegations of a different case involving CO_2 that Grynberg had filed against others, and on that basis could evaluate this case. (PHN Tab XX at US0001016, Praxair Reply Ex. 15.) That representation is fundamentally inconsistent with the notion that the DOJ attorney had previously communicated with Grynberg about his charges against Praxair and Nielson.

(PHN Tab YY, Praxair Mem. Ex. 2, Grynberg Depo. at 241:18-22, 242:15-17, 242:24-243:1.)[14]

48. Grynberg's initial complaint alleged that the value of Nielson's CO_2 production upon which royalties have been calculated is too low. Rather than relying on the contract proceeds, Grynberg initially contended that an alternative value should have been employed because the Agreement was not "arms-length." His Amended Complaint added allegations that an alternative value was required because the defendants had engaged in unspecified "misconduct" and/or Nielson had not fulfilled its obligation to market the CO_2 for the mutual benefit of itself and the Government. Most recently, he also alleges that the price adjustment provided for in the Agreement relating to oxygen use is an improper "processing allowance," such that Nielson has been calculating royalties on the basis of "net" rather than "gross" proceeds.

49. Grynberg also alleges that royalties have been based on improperly low volumes. Grynberg began by alleging in his Amended Complaint that defendants applied an improper 30% processing deduction, then alleged that Praxair took without payment (or royalty) 30% of the CO_2 produced. Most recently, it is now clear that Grynberg's claim derives from his belief that royalties should have been paid on the basis of wellhead volumes, and that use of tailgate volumes deprived the government of royalties on CO_2 and other gas components that were vented to the atmosphere.

[14] Grynberg testified that he did not recall when he communicated with Mr. Vogel, but that it was "definitely not a letter" and was "either telephone, or in person." (Praxair Mem. Ex. 2 at 242:3-243:15.)

50. In answer to numerous governmental approvals of the royalty practices challenged, Grynberg's summary judgment submission further adjusted his allegations regarding gas volumes to charge that the government was misled. Specifically, he claims that the defendants secured government approval through various misrepresentations: (i) Conoco's representations that plant vent gas would be returned and reinjected into a Conoco well, (ii) a Praxair statement that CO_2 vapor from the dry ice plant would be captured and recycled and (iii) statements regarding the extent of CO_2 gas that would not be included in royalty calculations as a consequence of tailgate measurement.

Pending Motions

51. Praxair moved for summary judgment on grounds that there had been no knowing false statement to reduce royalties. Praxair also contested this court's subject matter jurisdiction under (i) 31 U.S.C. § 3730(e)(3) (1999) (prior civil money penalty proceeding), (ii) 31 U.S.C. § 3730(e)(4) (1999) (the "public disclosure" bar), (iii) the "government knowledge" defense that predated 1986 Amendments to the Act (31 U.S.C. § 3730(b)(4) (1982)), (iv) the doctrine of "primary jurisdiction" and (v) Grynberg's lack of standing under Article III of the U.S. Constitution.[15]

52. In addition, Praxair argued that it is entitled to summary judgment because it never had any responsibility for, and does not benefit from, any purportedly false royalty activity.

---

[15] Praxair also sought summary judgment as to at least some claims under the FCA's statute of limitations provisions and as to some of Grynberg's damages demands.

53. Nielson joined in Praxair's summary judgment claims, and in addition sought summary judgment on the grounds that Nielson could not be held liable under the False Claims Act for the actions of Conoco arising before Nielson's purchase of the leasehold interests.

54. Because summary judgment for the defendants is appropriate based on undisputed evidence that there have been no "knowingly" false claims, and because Grynberg's claims are barred by 31 U.S.C. § 3730(e)(4) and the pre-1986 FCA statute, other asserted grounds for summary judgment will not be addressed separately.

CONCLUSIONS OF LAW

Summary Judgment Standards

1. Under Federal Rule of Civil Procedure 56(c), a court must render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "Summary judgment procedure is not properly regarded as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corporation v. Catrett,* 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting Fed.R.Civ.P. 1). Courts must construe Rule 56 "with due regard not only for the rights of the persons asserting the claims and defenses that are adequately based in fact to have those claims tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner

provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.*

2. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Only genuine disputes over facts that might affect the outcome of the action are relevant for summary judgment purposes. *Id.* at 248. Although "the movant has the burden of showing that there is no genuine issue of fact, . . . the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Id.* at 256.

3. Two aspects of the summary judgment arguments raised in this action compel particular scrutiny of the evidence adduced by Grynberg. First, certain of the asserted grounds for summary judgment challenge this Court's subject matter jurisdiction. As the proponent of this action, it is Grynberg's burden to establish jurisdiction as a matter of law.

> Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction. If jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence. [Relators] bear the burden of alleging "the facts essential to show jurisdiction" and supporting those facts with competent proof. Mere conclusory allegations of jurisdiction are not enough.

United States ex rel. Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1160 (10th Cir. 1999) (citations omitted).

4. Second, Grynberg's claims are facially suspect in economic terms, making it especially important that they be scrutinized with appropriate skepticism to assure a legitimate evidentiary demonstration of "genuine issues" as to "material facts." *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) ("If the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary [to evade summary judgment]."). There is no dispute that Nielson pays royalties based on what it is paid under the Agreement with Praxair. Yet, Grynberg argues that Nielson willingly accepts payment based on less gas volume and a lower gas value than is appropriate. What Grynberg never explains, however, is why Nielson would voluntarily reduce its revenue stream from Praxair, from which it retains 7/8ths, just to reduce the 1/8th share it pays to the government in royalties. In this context Grynberg must demonstrate a particularly compelling case to evade summary judgment.

Grynberg Has Not Shown Any "Knowing" False Statement

5. Grynberg's FCA case presents a so-called "reverse" false claim, one that affects payments to rather than from the government. Under this provision, liability may be imposed upon any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government. . . . " 31 U.S.C. § 3729(a)(7) (2000). Thus, to show any basis for liability,

Grynberg must be able to adduce evidence that the defendants affirmatively and "knowingly" submitted a "false record or statement" in order to reduce royalties.[16]

6. The undisputed evidence reveals that Federal government regulatory authorities have long been apprised of the concerns presented by Grynberg's complaints, either because of information provided by the defendants (or their predecessors) or because of the government's own investigations. In the face of that government knowledge, and the defendants' awareness of that government knowledge, even if Grynberg is correct that some of the defendants' representations were inaccurate, he has not presented evidence to raise a genuine issue that the representations were "knowingly" false, as required to establish False Claims Act liability.

7. Prior to 1986 Amendments, the FCA deprived courts of jurisdiction whenever an FCA action was based upon "evidence or information in the possession of the United States or any agency, officer, or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(c) (1976). Although that language, and the automatic defense it created, was removed in 1986, the government's knowledge of conduct challenged under the FCA remains relevant to liability.

---

[16] The "implied certification" concept that has been employed in some situations to establish liability under 31 U.S.C. § 3729(a)(1) will not apply given the requirement under § 3729(a)(7), comparable to § 3729(a)(2), for a false record or statement. *See Shaw v. AAA Eng'y & Drafting, Inc.*, 213 F.3d 519, 531-532 (10th Cir. 2000) (finding "implied certification" inapplicable where liability depends on submission of false statement or record). *See also United States ex rel. Aakhus v. Dyncorp., Inc.*, 136 F.3d 676, 682-83 (10th Cir. 1998) (requiring specific false statement to support action under § 3729(a)(2)).

8. In *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000), the court recognized that "there may still be occasions when the government's knowledge of or cooperation with a contractor's actions is so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA." The *Shaw* court cited in support two decisions from the Ninth Circuit that are also persuasive authority in this case: *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321 (9th Cir. 1995) and *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).

9. In *Butler*, the qui tam relator alleged false statements and claims regarding testing and performance of communications and navigation systems under a U.S. Army contract to develop and produce the Apache helicopter. The relator argued that certain testing did not conform to contract requirements and that test reports contained false statements. On appeal from a directed verdict for the defendants, the court noted undisputed factual findings of "a pattern of cooperation between the Army and [the defendant]," that "information flowed freely between [the defendant] and the Army concerning the testing," and that "all information upon which [Butler] bases his case was not only available to the Army, but in the Army's possession." 71 F.3d at 326. With that record, the district court concluded: "Given the government's knowledge of an accession at every turn to the Subsystems' testing modifications as well as to the Subsystems' limitations, [Butler] did not present legally sufficient evidence that any allegedly false statement or claim was made with the requisite intent." *Id.* Affirming, the Ninth Circuit held that the relator's arguments over the defendant's failure to adhere strictly to contract requirements raised "questions

of contract interpretation rather than false claims." *Id.* While recognizing that the relator had cited some statements that might not be entirely accurate, or discrepancies that rendered technically "false" certain reported test results, these statements could not reasonably constitute "knowingly" false claims where the discrepancies were "known to and approved by the Army." *Id.* at 328.

10. The Court reached a similar result in *Wang* where, as the *Shaw* decision noted: "The government had extensive knowledge of all the engineering deficiencies identified by the qui tam relator, and the defendant had an ongoing dialogue with the government about the problems." 213 F.3d at 534. *See Wang,* 975 F.2d at 1421. *See also United States ex rel. Durcholz v. FKW, Inc.*, 997 F. Supp. 1159, 1171-1172 (S.D. Ind. 1998) (no "false" statement for FCA liability where relevant government officials knew and approved of challenged methods used to submit proposal and pricing information).

11. FCA liability under § 3729(a)(7) requires the "knowing presentation of what is known to be false." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Although a representation and the true state of affairs may differ (or appear to differ), where both the party making the representation and the government know the "truth" of the matter, particularly where that truth has been affirmatively or openly disclosed by the representing party, the representation cannot be deemed "knowingly false" for purposes of FCA liability.

12. In this case, Grynberg has failed to create any genuine issue that the defendants made any "knowingly" false statements to the government. The defendants

cannot be said to have "knowingly" made false statements regarding the gas volumes used for royalty purposes when the methodology employed for measuring and reporting gas production was known to and approved by the responsible government authorities. Likewise, statements about the value assigned to the gas for royalty purposes was not knowingly false when the approach used to determine that value was openly disclosed to the government and repeatedly accepted.

13. The specific practice of measuring McCallum field CO_2 gas at the plant tailgate, rather than at the wellhead, was brought to the government's attention and approved as early as 1985 (twice). There is documentation that this practice was assessed and approved again by the government at least in 1987, 1989, 1996 and 2000. This practice has also apparently been observed during repeated, annual audits and inspections of the production and reporting practices followed by Conoco and Nielson. As in *Butler,* the evidence reveals such complete cooperation and information sharing with the government that royalty reports based on these measurement and valuation practices cannot reasonably be considered "knowingly false."

14. Grynberg's suggestion that the government was misled when evaluating the volume measurement practice, and deceived into approving it, is not supported by the evidence that has been presented. First, Conoco's statements that it would recover and reinject most plant vent gas has not been shown to have been a false representation of the anticipated practices at the time the statement was made. Even if considered false because later practice differed, that fact was openly and repeatedly disclosed to the government by Conoco and Nielson in various correspondence and reports. Indeed, even before

the end of 1985, Federal authorities knew that substantial gas was being vented without reinjection, which left that gas unmeasured and unreported for royalty computation purposes. The government's own 1987 inspection report and specific written communications to the government in 1989 and 1996 record that the gas is vented rather than reinjected. Yet, the government reapproved the royalty practices late last year despite the known discrepancy from Conoco's originally stated intent.

15. Similarly, Grynberg's allegations that the government was misled about the extent of gas venting is unavailing. Even if Grynberg's calculation of gas losses are more accurate than what the defendants may have projected or reported, Grynberg has demonstrated no more than inaccuracy or mistake, not actionable false statements. *See Wang,* 975 F.2d at 1420-1421. Moreover, Conoco and Nielson were entirely open with the government about the extent of the differences between the wellhead volumes and the tailgate volumes reported for royalty purposes. The different volumes were variously reported to state and federal authorities, both in routine submissions and pursuant to information requests in the context of periodic audits or inspections. Government authorities had available the very same data from which Grynberg derives his argument that gas loss figures supplied by the defendants were inaccurate. Grynberg's assertions may be the basis for a disagreement over calculation methods, but they do not establish the requisite intent under the FCA of "knowingly false" statements.

16. Praxair's statement that ice plant vapor would be recycled also falls short of a "knowingly false" statement for FCA purposes. There is no evidence that the stated intent, made before the dry ice facility was even

built, was false when made. The only evidence is that this practice was the initial expectation, despite actual practice that later differed. There is also no evidence that the statement was made for the purpose of reducing royalties, given that Praxair did not pay royalties and tailgate volume measurement had already been approved. Most importantly, however, the actual differing practice was voluntarily disclosed to the government, which nevertheless continued to approve the measurement and royalty methods being used.[17] As in *Butler*, the government knew of and approved the discrepancy and, as such, the original statement cannot reasonably be deemed "knowingly false."

17. Grynberg's claims that the gas was undervalued also present no basis for FCA liability. Indeed, Grynberg has identified no "false statements" at all with regard to his argument that royalties were computed on a gas value that was too low. Consistent with typical practice under Federal regulations, and with the government's recognition and approval, Conoco and Nielson paid royalties based on the total, "gross" proceeds received from sale of the CO_2 under an arms-length contract. The nature of the contract and its pricing provisions as well as the defendants' relationship, were all fully disclosed to the government from the outset. As to the undervaluing claim, there are no false statements alleged, much less evidence of any effort to "knowingly" misrepresent this royalty practice.

---

[17] Given Grynberg's claim that royalties should have been paid on wellhead volumes, and the government's knowledge of the extent of unmeasured venting at the plant (based on comparison of wellhead and tailgate volumes), representations about where at the plant the venting occurred (i.e. dry ice vs. other operations) are not at all material.

18. Grynberg alleges, as best as can be discerned, that the value used for royalty purposes was "false" because it was "unreasonably" low and so a higher value should have been used. Even if Grynberg were correct as a matter of regulatory interpretation, the value employed was not "knowingly false." The government was apprised of and accepted the valuation approach followed. Grynberg's argument may raise a dispute over how the regulations should have been applied in this instance, but such regulatory debates are not actionable under the FCA. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996), *X Corp. v. Doe*, 816 F. Supp. 1086, 1093 (E.D. Va. 1993).

19. Grynberg's allegations that a different gas value should have applied because of "misconduct" or a "failure to market" for the mutual benefit of the lessee and the government likewise do not trigger FCA liability. The only "misconduct" to which Grynberg alludes are the supposed misrepresentations about gas volume, which as already explained were not "knowingly false." There is no evidence that Conoco's and Nielson's CO_2 marketing, in the form of sales under the Agreement, did not mutually benefit the lessees and the government. In any event, that marketing practice was fully disclosed to and approved by the government, as opposed to being "knowingly false."

20. Grynberg also argues that Nielson has falsely paid royalties based on "net" proceeds while reporting royalties as having been paid on "gross" proceeds under the Agreement. Specifically, Grynberg argues that the price adjustment provided for in the Agreement based on oxygen used in the plant is a "processing allowance" improperly deducted from gross proceeds before royalties

are computed. The evidence does not support that contention. This price adjustment provision was disclosed to and approved by the government from the beginning. An adjustment to the CO_2 price is triggered monthly based on the quality of raw gas supplied. This adjustment affects the base price paid under the Agreement and so may reduce the total proceeds received. It is not, however, an amount that Nielson deducts from the proceeds received under the Agreement and on which it pays royalties. Rather, it affects the extent of those receipts in a given month in the same manner that gross receipts are influenced by the volumes sold and annual price adjustments. In its 1985 approval letter, MMS described this feature of the Agreement as a "provision for decreased prices" and a "price reduction provision," not as a "processing allowance." Notably, royalties based on gross proceeds received under this pricing arrangement were reapproved by MMS in 2000, even after Grynberg's claims were presented. While Grynberg may disagree with this aspect of the Agreement's pricing mechanism, paying royalties based on the resulting "gross" proceeds did not produce "knowingly false" statements of gas value.

21. In sum, Grynberg's allegations all relate to conduct or concerns that the government has known about and approved. Royalties based on these disclosed and approved practices cannot reasonably be treated as "knowingly false" statements meant to reduce royalty obligations to the government. Having failed to show any basis to conclude that the defendants acted with the requisite intent to establish FCA liability, summary judgment for the defendants is appropriate.

Pre-1986 Knowledge

22. Prior to 1986, the FCA barred, without exception, suits based on information already in the government's possession. 31 U.S.C. § 3730(b)(4) (1982). The U.S. Supreme Court has held that 1986 amendments to the FCA, which eliminated that statutory bar, were not retroactive. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997). As a result, claims based on pre-Amendment conduct and government knowledge remain barred. *Id.* The "crucial event for purposes of non-retroactivity is the alleged presentation by [the defendant] of a false claim, and not the public disclosure of that conduct." *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1031 (9th Cir. 1998). Because Grynberg's claims are based on information and conduct known to the government before the 1986 Amendments, his action is statutorily barred.

23. Review of Grynberg's initial and amended Complaints confirms that his allegations rest on knowledge that (i) due to tailgate measurement substantial gas volumes were not included in royalty calculations and (ii) royalties were based on the price paid for CO_2 under the Agreement (which Grynberg considers too low).

24. Before the end of 1985, the Government was fully aware that substantial CO_2 gas volumes were being excluded from royalty calculations and were instead being vented to the atmosphere. Based on comparison of wellhead and plant tailgate volume measurement, the government knew the extent of that gas loss. The government also knew the terms of the Agreement under which the CO_2 was sold (including the pricing provisions), as well as

the actual value (per mcf) upon which royalties were being calculated and paid. In short, prior to the 1986 FCA Amendments, the government had possession of all the information on which Grynberg based his action.

25. The fact that royalty reports and payments based on tailgate volumes and contract proceeds continued after the 1986 Amendments does not preserve Grynberg's action. The continuing royalty practices were unchanged from those that preceded the 1986 Amendments. Grynberg's claims are based on the same gas volume and value reporting approach that preceded the Amendments and about which the government was fully informed before 1986.

26. Once it was determined in 1985 that royalties would be paid based on tailgate volumes and proceeds resulting from contract prices, the post-1986 royalty reports and payments on that basis were "true." Royalty reports reflected the approved practices. The only thing "false" that Grynberg challenges is the undertaking to calculate royalties on volumes "knowingly" below wellhead production levels and "knowingly" below the prices at which finished CO_2 products are sold. That entire concept and approach to royalty reporting and payment was completely established in 1985. There was no new "offense" perpetrated thereafter, only repetitious submissions based on the initially approved practices.

27. The Supreme Court has rejected retroactive elimination of the FCA's statutory bar on qui tam actions:

> Prior to the 1986 amendment, respondent's qui tam action was completely barred because of Hughes' disclosure to the Government of information about its claims submissions. [Retroactively

> applying] the 1986 amendment would revive that action, subjecting Hughes to previously foreclosed qui tam litigation, much like extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action . . .

Schumer, 520 U.S. at 950 (citation omitted). The royalty practices challenged in this case were established prior to the 1986 Amendments and the statutory defense available to claims that those practices create FCA liability was not retroactively eliminated by the Amendments. Consequently, Grynberg's claims are properly dismissed based on this Court's lack of subject matter jurisdiction.

Public Disclosure Bar

28. The FCA's jurisdictional requirements provide that no court has jurisdiction over a private qui tam lawsuit based on the public disclosure of allegations of wrongdoing unless the relator is an "original source" of the information. *See United States ex rel. Fine v. Advanced Sciences*, 99 F.3d 1000, 1004 (10th Cir. 1996); 31 U.S.C. § 3730(e)(4)(A). The purpose behind this jurisdictional bar is to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Fine v. Sandia Corporation*, 70 F.3d 568, 571 (10th Cir. 1995) (quotation omitted). This purpose is not served by allowing qui tam relators to recover where the government has already identified the problem and has an easily identifiable group of probable offenders. *See id.* at 572-73. As a result, a relator's claim should be analyzed "in the context of Congress' 'twin goals

of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.'" *See Advanced Sciences*, 99 F.3d at 1004 (quotations omitted). This Court's fundamental task in interpreting the FCA is "to give effect to the intent of Congress." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940).

29. In light of the Congressional intent and legal background of the jurisdictional bar to qui tam suits, it is apparent that there are two situations to which the jurisdictional bar may apply. The first is where the government is actively pursuing the alleged wrongdoing when the qui tam action is sought. In such a situation, there is no need to determine whether the alleged wrongdoing has been publicly disclosed because it is clear that the government "has already identified the problem." *Sandia*, 50 F.3d at 572. The second situation is where the government is not actively investigating the alleged wrongdoing. In this situation, the appropriate inquiry for the purposes of the jurisdictional bar is whether the government is "capable" of pursuing the suit itself. This "capability" inquiry requires determination of whether the complaint is "based upon" a "public disclosure" within the meaning of 31 U.S.C. § 3730(e)(4)(A). Such a determination requires consideration of four separate questions:

> (1) whether the alleged "public disclosure" contains allegations or transactions from one of the listed sources;
>
> (2) whether the alleged disclosure has been made "public" within the meaning of the False Claims Act;

(3) whether the relator's complaint is "based upon" this "public disclosure"; and if so,

(4) whether the relator qualifies as an "original source" under section 3730(e)(4)(B).

Advanced Sciences, 99 F.3d at 1004. (citing *United States ex rel. Fine v. MK-Ferguson Company*, 99 F.3d 1544, 1545 (10th Cir. 1996)).

30. In this case, it is plain that the government repeatedly investigated the very concerns that Grynberg has raised and is thus more than "capable" of pursuing them itself. Multiple times it has examined the practice of tailgate volume measurement and its implications for Federal royalty payments. At oral argument, Grynberg's counsel acknowledged that there is no difference between Grynberg's FCA claim that royalties should be based on wellhead rather than tailgate volumes and the MMS 1996 Order to Comply addressing that very issue. Likewise, the value assigned to the CO_2 for royalty purposes, and the sales contract from which that value derives, was formally examined and approved by the government in both 1985 and 2000, and was scrutinized in several royalty audits. An FCA action was not needed to bring these concerns to the government's attention and trigger active investigations. Based on this state of affairs alone, this Court should not take jurisdiction over Grynberg's claims.

31. Summary judgment also follows, however, even under a more detailed "public disclosure" bar analysis. The "allegations" or "transactions" upon which Grynberg's case is based were publicly disclosed in a response to a Freedom of Information Act ("FOIA") request that Grynberg made to the MMS. The MMS response included pages from its 1985 letter describing Conoco's Agreement with

LCC and related "Findings and Conclusions." (PHN Tab XX at US001018-US001019, Praxair Reply Ex. 15.) These documents resulted from the MMS administrative investigation triggered by Conoco's request for approval.[18] The documents revealed that Conoco was selling the CO_2 under a contract with LCC and that LCC would pay Conoco a price per ton based on the finished product measured at the plant tailgate.[19] Thus, the documents disclosed what Grynberg alleges to be both the "true" and the "misrepresented" facts: the "true" wellhead volumes would be "misrepresented" by reporting as production for royalty purposes only the lesser tailgate volume. Likewise, it revealed that royalties would be paid based on the Agreement proceeds, not on the basis of proceeds from LCC's subsequent sales of finished products as Grynberg insists is required.[20] The Tenth Circuit has determined that a disclosure constitutes an "allegation" or "transaction" sufficient to trigger the public disclosure bar when it

---

[18] Although Grynberg challenges the vigor of that investigation, it plainly falls within the broad range of pursuits that qualify as an "administrative ... investigation" from which the allegations or transactions must be publicly disclosed for purposes of the jurisdictional analysis under § 3730(e)(4). *See United States v. Bank of Farmington*, 166 F.3d 853, 862 (7th Cir. 1999) (official agency inquiry); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323-324 (2d Cir. 1992); *United States ex rel Mistick PBT v. Hous. Auth. of the City of Pittsburgh*, 186 F.3d 376, 384 (3d Cir. 1999), cert. denied, 529 U.S. 1018, 120 S. Ct. 1418, 146 L. Ed. 2d 310 (2000) (processing FOIA request).

[19] Although the specific price was not disclosed in the FOIA response document, it was part of the administrative investigation and was learned by Grynberg from other public sources.

[20] Grynberg alleges that CO_2 value for royalty purposes should have been based on the market price for products produced by the plant. (*See* PHN Tab TT, Amended Complaint ¶ 23 (CO_2 value should be $3.45/mcf); PHN Tab VV, ¶ 11 (alleging Praxair sales price for plant products of $3.45/mcf), Grynberg Opp. Ex. R-1.)

presents the issue "in a questioning light." *United States ex rel. Fine v. Advanced Sci.*, 99 F.3d 1000, 1005 (10th Cir. 1996). The transaction disclosed in the documents produced to Grynberg under FOIA yielded the very information that had earlier "set the government squarely on the trail" of the same concerns raised by Grynberg's claims. In response to that same information, the government made its own inquiries about the impact that plant losses would have on tailgate volume measurements relative to wellhead volumes.[21] Disclosure pursuant to a FOIA request is widely recognized as sufficient to make the transaction "public" within the meaning of the FCA. *See United States ex rel Burns v. A.D. Roe Company, Inc.*, 186 F.3d 717, 723 (6th Cir. 1999); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519-20 (9th Cir. 1995), vacated on other grounds, 520 U.S. 939 (1997). Grynberg's allegations are undeniably based upon the same transaction publicly disclosed in the FOIA materials: use of tailgate rather than wellhead volumes and gas valuation based on the contract price rather than higher finished product sales prices.

32. The pertinent allegations and transactions were also publicly disclosed in the context of the 1996 MMS Order to Comply and the subsequent administrative investigation. In that setting, MMS and BLM were specifically examining the propriety of paying royalties based on tailgate rather than wellhead volumes, the very conduct

[21] Grynberg acknowledged to the U.S. attorney that this information about Conoco's sales at the plant tailgate formed "the basis for the complaint." (Grynberg Opp. Ex. R-5.) He submitted the FOIA response to the Department of Justice as part of the "material evidence and information" relating to his allegations. (PHN Tab XX.)

on which Grynberg's FCA claims rest. That administrative investigation was disclosed to Ed Calvert. In this circuit, providing the allegations or transactions to a single individual previously unconnected with the fraud is sufficient to constitute a "public disclosure" under the FCA. *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1005 (10th Cir. 1996); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1521 (10th Cir. 1996). The only evidence presented in this case indicates that Conoco and Nielson have had total responsibility for all royalty calculation and reporting activity. (*See, e.g.*, Praxair Mem. Ex. 5 at 229-231 (regarding Nielson's staff preparation of MMS royalty report forms).) As in *Advanced Sciences*, Grynberg has not met his burden on this jurisdictional issue to show that Mr. Calvert was no stranger to the fraud, even if the company he works for did invest in the McCallum properties. 99 F.3d at 1005 ("Fine has pointed to no facts indicating that Sikora otherwise had some involvement with the alleged fraud through other means independent of Fine's disclosure to him.").

33. In light of these public disclosures, the analysis turns to whether Grynberg qualifies as an "original source." The answer is no. First, Grynberg has not demonstrated that he had "direct and independent knowledge of the information on which the allegations are based," a requirement of 31 U.S.C. § 3730(e)(4)(B). Grynberg does little more than proclaim that "his knowledge was not derivative of others, but rather was based on his own investigation." The Tenth Circuit has made clear, however, that such conclusory assertions are insufficient.

> To establish original source status knowledge, a qui tam plaintiff must allege specific facts – as

> opposed to mere conclusions – showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with competent proof. Only in this way will the district court be able to adequately identify legitimate qui tam actions and weed out parasitic plaintiffs who offer only secondhand information, speculation, background information or collateral research.

United States ex rel. Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1162-1163 (10th Cir. 1999) (finding that qui tam plaintiffs failed to establish that they qualified as original sources where they failed to offer particularized fact allegations identifying what fraud the plaintiffs witnessed).

34. Grynberg, not an insider, did not witness any fraud. Grynberg has not identified a single element of his "investigation" that involved anything other than second hand information, speculation, background information or collateral research (i.e. conversations with Nielson officers, conversations with various third parties, telephone calls to Praxair, FOIA requests, research at the COGCC, photographs from a public road, review of oil and gas publications, and speculation regarding what would have been a fair CO_2 price), precisely what the Tenth Circuit found insufficient in *Hafter*. *See also United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 526 (9th Cir. 1999) (finding that relator who offered only conjecture and speculation regarding alleged fraud did not qualify as an original source); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1159 (2nd Cir. 1993), cert. denied, 508 U.S. 973, 125 L. Ed. 2d 663, 113 S. Ct. 2962 (denying original source status to plaintiff

who possessed some background knowledge, but who was not the source of the core information underlying the complaint). At best, Grynberg learned of alleged possible wrongdoing from insiders at Nielson and then conducted further investigation into the matter. Such second hand information and research does not constitute direct and independent knowledge under the FCA. *See United States ex rel. Devlin v. State of Cal.*, 84 F.3d 358, 361 (9th Cir.), cert. denied, 519 U.S. 949, 117 S. Ct. 361, 136 L. Ed. 2d 252 (1996) (holding that realtors who learned of defendant's wrongdoing from an insider and conducted an investigation to confirm the allegations, did not have "direct and independent" knowledge because they "did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else."). Grynberg's investigation, general knowledge, education, experience and expertise do not render him an "original source."

35. Second, the contemporaneous written record confirms that Grynberg did not make the jurisdictional pre-filing disclosures required by the FCA. 31 U.S.C. § 3730(e)(4)(B) (1999). On January 9, 1998, after filing his Complaint, Grynberg provided the Department of Justice ("DOJ") with notice of his FCA action by letters to the Honorable Janet Reno and to the Colorado U.S. Attorney. Neither letter indicates or suggests any prior communication between Grynberg and the United States regarding the matter, but rather both suggest that this was the first time Grynberg had provided his material evidence to the United States. At best, Grynberg has only limited or conflicting recall as to what information he may have provided to the government about his claims before filing the complaint. There is no corroborating written record of

Grynberg having transmitted any information about his claims to the government before filing the complaint.[22] Grynberg has not met his burden to establish that he made the jurisdictionally required pre-filing disclosures.[23]

No Praxair Liability

36. Grynberg's claims against Praxair must also be rejected because he has not shown that Praxair made any false statements to reduce obligations to the U.S. government. All royalty reports and payments were prepared and

---

[22] At the March 2, 2001, hearing, Grynberg represented that he was not aware of any evidence to support a conclusion that the requisite pre-filing disclosures were made (i.e. fax transmittal sheets, copies of letters, etc) other than Grynberg's December 2000 Affidavit. (Hearing 117:18-118:10) This representation came following discovery by the parties and extensive briefing on the issue of pre-filing disclosure as part of the motions for summary judgment. Nevertheless, on March 16, 2001, Grynberg filed "evidence," to support a conclusion that the requisite pre-filing disclosures were made. This evidence consists of a letter from Grynberg to Mr. Vogel dated September 29, 1997. Accompanying the letter is an affidavit signed by Grynberg's current secretary, Beverly Lunnon, which indicates that she discovered the letter on March 6, 2001, in Grynberg's computer. This letter and affidavit, however, do not support a finding that Grynberg made the requisite pre-filing disclosures. Ms. Lunnon did not work for Grynberg in 1997 and does not represent that the letter was ever sent to Mr. Vogel. No evidence indicates that the letter was ever signed by Grynberg, or sent to Mr. Vogel, prior to the filing of the Complaint. Moreover, that this letter appeared only after the March 2, 2001, hearing is suspect. Not only does the letter have no evidentiary value, but its authenticity is questionable.

[23] Having previously testified that he could not recall the timing of his disclosures, and having provided no corroboration, the court will not accept Grynberg's much later affidavit purporting to detail such disclosures as the basis to create an issue on this point in order to defeat summary judgment. *See Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Katz v. Aurora*, 85 F.Supp.2d 1012, 1017 (D.Col. 2000).

submitted by Conoco and Nielson, without any involvement by Praxair (or LCC). Praxair's only role was providing accurate information (i.e. tailgate volume measurements, oxygen use volumes, sales price data) pursuant to the Agreement. Because it was not the lessee, it had no royalty obligations to the government and its economic position was fixed by the Agreement, regardless of the royalties Conoco and Nielson paid. The only alleged misrepresentations Grynberg assigns to Praxair and LCC are the 1992 report that ice plant CO_2 vapor would be recycled and a 1996 under estimate of CO_2 losses associated with the plant. Given that (i) the challenged royalty practices were approved both before and after these representations, (ii) the government knew the extent of venting based on knowledge of both wellhead and tailgate volumes and (iii) the government approved the venting and royalty practices even after learning that ice plant vapors were not being recycled, there is no basis for any inference that these LCC and Praxair statements were made for the purpose of reducing royalty obligations. Moreover, Grynberg argues that wellhead volumes and an alternative CO_2 market value should have been used to calculate royalties. The wellhead measurements and the decision of what value to use when calculating royalties were always controlled by Conoco and Nielson. Praxair was thus totally irrelevant to the royalty underpayments that Grynberg alleges. Consequently, Grynberg has not presented evidence of a genuine issue on any element necessary to sustain an FCA action against Praxair, making summary judgment for Praxair the appropriate outcome.

Conclusion

37. Based on the foregoing conclusions of law in paragraphs 1-36 above, summary judgment must be granted to defendants Praxair and Nielson.

Accordingly, it is

ORDERED that Defendant Nielson & Associates, Inc.'s Motion for Summary Judgment filed April 6, 2000, is GRANTED. It is

FURTHER ORDERED that Defendant Praxair, Inc.'s Motion for Summary Judgment filed April 6, 2000, is GRANTED. It is

FURTHER ORDERED that this case is DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that each party shall bear its own attorney's fees. Defendants, as the prevailing parties, shall have their costs by the filing of a bill of costs with the clerk of this court within ten (10) days of the entry of judgment. It is

FURTHER ORDERED that Defendant Praxair Inc.'s Motion to Strike Certain of Plaintiff's Experts filed January 24, 2000, is DENIED AS MOOT. It is

FURTHER ORDERED that Defendant Nielson & Associates, Inc.'s Motion to Strike Plaintiff's Experts filed March 24, 2000, is DENIED AS MOOT. It is

FURTHER ORDERED that Relator's Objection to Order of Magistrate Judge Denying Relator's Motion to Set Aside, Clarify or Modify Protective Order filed October 25, 2000, is DENIED AS MOOT. It is

FURTHER ORDERED that Relator's Motion for Order to Disregard Vogel and Wood Testimony at the Summary Judgment Stage filed December 22, 2000, is DENIED.

DATED at Denver, Colorado, this 28th day of March, 2001.

BY THE COURT

Wiley Y. Daniel

United States District Court Judge

APPENDIX F – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED MARCH 28, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 98-D-16

UNITED STATES OF AMERICA, ex rel.
JACK J. GRYNBERG

Plaintiff,

v.

PRAXAIR, INC. & NIELSON & ASSOCIATES, INC.,

Defendants.

JUDGMENT

(Filed Mar. 28, 2001)

Pursuant to and in accordance with the Order filed on March 28, 2001 by the Honorable Wiley Y. Daniel, United States District Judge, and incorporated herein by reference as if fully set forth it is

ORDERED that judgment is hereby entered in favor of Defendants, Praxair, Inc. & Nielson & Associates, Inc., and against Plaintiff, Jack J. Grynberg, on Defendants' motions for summary judgment. It is

FURTHER ORDERED that Plaintiff's complaint and action are dismissed with prejudice. It is

FURTHER ORDERED that each party shall bear its own attorney's fees. It is

FURTHER ORDERED that Defendants shall have their costs by the filing of a Bill of Costs with the Clerk of this Court within ten (10) days of entry of judgment.

DATED at Denver, Colorado this 28th Day of March, 2000 [sic].

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

APPENDIX G – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JANUARY 5, 2005

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 01-1214 and 01-1242

UNITED STATES OF AMERICA ex rel.
JACK J. GRYNBERG

Plaintiff-Appellant-Cross-Appellee,

v.

PRAXAIR, INC.,

Defendant-Appellee-Cross-Appellant,

NIELSON & ASSOCIATES, INC.,

Defendant-Appellee.

ORDER

(Filed January 5, 2005)

Before **BRISCOE**, **ANDERSON** and **O'BRIEN**, Circuit Judges.

Appellant/Cross-Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

APPENDIX H

31 U.S.C. § 3729. False claims

(a) Liability for certain acts. [Caution: For inflation-adjusted civil monetary penalties, see 28 CFR 85.3.]. Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

APPENDIX I

31 U.S.C. § 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729 [31 USCS § 3729]. If the Attorney General finds that a person has violated or is violating section 3729 [31 USCS § 3729], the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 [31 USCS § 3729] for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section

until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person

initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition

transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or

conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and

damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 [31 USCS § 3729] upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729 [31 USCS § 3729], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

APPENDIX J – APRIL 4, 1985 LETTER FROM MMS TO CONOCO, INC.

United States Department of the Interior
MINERALS MANAGEMENT SERVICE
ROYALTY MANAGEMENT PROGRAM
P.O. Box 25165
DENVER, COLORADO 80225
Mail Stop 653

[SEAL]

IN REPLY
REFER TO:
MMS-RVS-OG:84-906

APR 4 1985

ENCLOSURE CONTAINS
COMPANY PROPRIETARY
INFORMATION FOR
RELEASE ONLY TO CONOCO

Conoco, Inc.
Attention: T. R. Painter
907 North Poplar
Casper, WY 82601

Gentlemen:

By letter dated October 22, 1984, you requested that MMS approve Conoco's "production reporting sequence" for carbon dioxide (CO_2) produced from the McCallum Unit in Jackson County, Colorado. Attached to your letter were copies of an Application for the Establishment of Royalty Values (Form 9-1926), a diagram of field facilities, and the sales agreement dated June 2, 1983.

The CO_2 is produced from the Dakota-Lakota zone through two facilities; one crediting production to the Dakota-Lakota, the other crediting production to the Morrison Participating Area "production bank." The "production bank" serves as a monitor on the CO_2 volume which

originated from the Morrison Formation, and is now being recovered from the Dakota-Lakota zone.

The Bureau of Land Management (BLM) has jurisdiction over unit operations and production reporting for the McCallum Unit. You are advised to request approval of your "production reporting sequence" for the McCallum Unit from the appropriate BLM District Office in Craig, Colorado.

Although MMS no longer requires the submittal of Form 9-1926 for the establishment of royalty value, we interpret your October 22, 1984 submission as a request for advice on valuation for royalty purposes.

Under provisions of the sales agreement, dated June 2, 1983, CO_2 is liquefied at a plant on the McCallum Unit by Liquid Carbonic Corporation. Liquid Carbonic owns and operates the plant; however, Conoco retains ownership of the CO_2 until the plant tailgate. At that point, Liquid Carbonic purchases the CO_2 for a base price specified in the agreement. The price paid there varies annually, depending on market prices obtained by Liquid Carbonic for its liquid CO_2 in defined sales regions.

CONTAINS COMPANY
PROPRIETARY INFORMATION
FOR RELEASE ONLY TO
CONOCO

ROYALTY MANAGEMENT PROGRAM
ROYALTY VALUATION AND STANDARDS DIVISION

Findings and Conclusions
on
Valuation of CO_2 Produced by
Conoco at the McCallum Unit, Colorado

Background

- By letter dated October 22, 1984, Conoco, Inc. requested that the MMS review attached materials and approve Conoco's "production reporting sequence" for carbon dioxide (CO_2) produced from the McCallum Unit in Jackson County, Colorado. The attached materials were an Application for the Establishment of Royalty Values (Form 9-1926); a diagram of field facilities; and a contract with Liquid Carbonic Corporation, dated June 2, 1983, for the sale of CO_2.

- Conoco is operator of the McCallum Unit.

- Conoco produces raw CO_2 from the Dakota-Lakota zone, and transports it by two supply lines (high pressure and low pressure) to a liquefaction plant at the McCallum Unit where it is put into marketable condition. Liquid Carbonic, as owner of the plant, liquefies the CO_2 and purchases it *after* the liquefaction process. Conoco retains full ownership, of the CO_2 until the tailgate of the plant.

- The contract calls for a price of $7.10 per ton (approximately $0.41 per Mcf at 14.73 psia and

60°F) for the finished product. The price will vary annually depending on market prices obtained by Liquid Carbonic for its liquid CO_2 in defined sales regions.

- Any vent gases left over from processing will be returned to Conoco. These gases will be run through a separator to remove any existing condensate. The remaining gas will be compressed and reinjected into the Dakota-Lakota zone.

- From September 1976 to December 1983, Conoco injected a total of 1,785,198 Mcf of Morrison Formation CO_2 into the Dakota-Lakota Well No. 2. This had been reflected in the submittal of Forms 9-329 for the Morrison Participating Area.

(2)

Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

No. 04-1363

In The Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. JACK J. GRYNBERG,

Petitioner,

v.

PRAXAIR, INC. and
NIELSON & ASSOCIATES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

NIELSON & ASSOCIATES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHRIS EDWARDS
Counsel of Record
SIMPSON, KEPLER & EDWARDS, LLC
THE CODY WYOMING DIVISION OF
BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C.
P.O. Box 490
Cody, Wyoming 82414
307-527-7891

Attorney for the Respondent Nielson & Associates, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent Nielson & Associates, Inc. submits that the following questions more accurately reflect the issues presented by the ruling below:

1) Whether the jurisdictional bar of 31 U.S.C. §3730(e)(4)(A) applies to the Relator's Complaint when the Relator has relied on official documents/decisions in the public domain?

2) Whether a Relator may be an original source under 31 U.S.C. §3730(e)(4)(B) when the only knowledge he has gained is from public sources and he has no direct and independent knowledge of the information?

3) Whether a Court that lacks subject matter jurisdiction under the False Claims Act has jurisdiction to award attorney fees under 31 U.S.C. §3730(d)(4)?

4) Whether a Defendant who prevails in a false claims act case due to lack of subject matter jurisdiction of the Relator is a prevailing party under 31 U.S.C. §3730(d)(4)?

RULE 29.6 STATEMENT

Nielson & Associates, Inc. is a Wyoming Corporation which does not have any parent or subsidiary corporations. No other corporations own any interest in it nor does it own any interest in any other corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
I. FACTUAL BACKGROUND	1
A. The Parties	1
B. The 1983 Agreement	2
C. Accounting & Payment Under The 1983 Agreement	3
D. The Federal Royalty System	4
E. Government Approval of Nielson's Practices	5
F. Grynberg's Investigation	9
II. PROCEDURAL BACKGROUND	10
ARGUMENT	13
I. THE JURISDICTIONAL BAR OF 31 U.S.C. §3730(e)(4)(A) APPLIES TO THE RELATOR'S COMPLAINT BECAUSE THE RELATOR HAS SOLELY RELIED ON OFFICIAL DOCUMENTS/DECISIONS IN THE PUBLIC DOMAIN	13
II. A RELATOR MAY NOT BE AN ORIGINAL SOURCE UNDER 31 U.S.C. §3730(e)(4)(B) WHEN THE ONLY KNOWLEDGE HE HAS GAINED IS FROM PUBLIC SOURCES AND HE HAS NO DIRECT AND INDEPENDENT KNOWLEDGE OF THE INFORMATION	18

TABLE OF CONTENTS – Continued

Page

III. A COURT THAT LACKS SUBJECT MATTER JURISDICTION UNDER THE FALSE CLAIMS ACT HAS SUBJECT MATTER JURISDICTION TO AWARD ATTORNEY FEES UNDER 31 U.S.C. §3730(d)(4) 21

IV. A DEFENDANT WHO PREVAILS IN A FALSE CLAIMS ACT CASE DUE TO LACK OF SUBJECT MATTER JURISDICTION OF THE RELATOR IS A "PREVAILING PARTY" UNDER 31 U.S.C. §3730(d)(4) 21

REASONS FOR DENYING THE PETITION 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES:

F & S Construction Co. v. Jensen, 337 F.2d 160 (10th Cir. 1964) 22

Kennard v. Comstock Resources, Inc., 363 F.3d 1039 (10th Cir. 2004) 21

United States ex rel. Aflatooni v. Kitsap Physicians Services, 163 F.3d 516 (9th Cir. 1999) 19

United States ex rel. Devlin v. California, 84 F.3d 358 (9th Cir.), *cert. denied*, 519 U.S. 949 (1996) 19

United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997) 22

United States ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir. 1996) 17

United States ex rel. Fine v. MK-Ferguson Co., 99 F.3d 1538 (10th Cir. 1996) 19

United States ex rel. Fine v. Sandia Corp., 70 F.3d 568 (10th Cir. 1999) 14, 16

United States ex rel. Grynberg v. Praxair, Inc., 207 F.Supp.2d 1163 (D. Colo. 2001) 11

United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038 (10th Cir. 2004) 12, 15

United States ex rel. Hafter v. Spectrum Emergency Care, Inc., 9 F.Supp.2d 1273 (D. Kan. 1998), *affd*, 190 F.3d 1156 (10th Cir. 1999) 18

United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc., 190 F.3d 1156 (10th Cir. 1999) 18, 19

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Holmes v. Consumer Insurance Group, 318 F.3d 1199 (10th Cir. 2003) 14

United States ex rel. King v. Hillcrest Health Center, Inc., 264 F.3d 1271 (10th Cir. 2001) 20

United States ex rel. Koerner v. Crescent City E.M.S., Inc., 946 F.Supp. 447 (E.D. La. 1996) 20

United States ex rel. Kriendler & Kriendler v. United Technologies Corp., 985 F.2d 1148 (2nd Cir. 1993), *cert. denied*, 503 U.S. 973 (1993) 19

United States ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993) 16, 22

United States v. A.D. Roe Co., Inc., 186 F.3d 717 (6th Cir. 1999) 15

United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1999) 15

United States ex rel. Springfield Terminal Ry. v. Quinn, 304 U.S. App. D.C. 347, 14 F.3d 645 (D.C. Cir. 1994) 17, 18

United States ex rel. Stone v. Rockwell Int'l Corp., 265 F.3d 1157 (10th Cir. 2001) 21

FEDERAL STATUTES:

31 U.S.C. §§3729 *et seq.* 10

31 U.S.C. §3729(a)(7) 10, 11

31 U.S.C. §3730(d)(4) 11, 12, 21

TABLE OF AUTHORITIES – Continued

Page

31 U.S.C. §3730(e)(4)(A) 13, 18

31 U.S.C. §3730(e)(4)(B) 18, 20

FEDERAL RULES:

Supreme Ct.R. 10(a) 23

Supreme Ct.R. 10(c) 23

BRIEF IN OPPOSITION

Respondent Nielson & Associates, Inc. respectfully requests that the Court deny the Petition for a Writ of Certiorari in its entirety.

COUNTER STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Parties

Nielson & Associates, Inc. ("Nielson") is a privately-held Wyoming Corporation which produces and sells oil and gas from federal and non-federal lands. Nielson produces oil, natural gas, and carbon dioxide ("CO_2") from the McCallum and South McCallum Units (collectively the "McCallum Fields") in northern Colorado, pursuant to leases originally between Conoco, Inc. ("Conoco") and the United States. In 1994, Nielson purchased Conoco's interests in the McCallum Fields.

Praxair, Inc. ("Praxair") is a Delaware Corporation that among other things, purchases, processes, purifies, and sells industrial gases. Praxair owns the plant which purifies and converts Nielson's raw CO_2 from the McCallum Fields into liquid suitable for beverages, food processing, and other uses, and also makes dry ice. Praxair purchased CO_2 from Nielson pursuant to a June 1983 Agreement for the Sale and Purchase of Carbon Dioxide as subsequently amended (the "Agreement"). Praxair's predecessor in the plant was Liquid Carbonics Corporation, Inc. which Praxair acquired in 1996.

Neither Praxair nor its predecessor Liquid Carbonics Corporation ("LLC") have ever been affiliated with Nielson

or its predecessor, Conoco. LCC and Conoco were not conducting business in any substantial way prior to negotiating the Agreement. Nielson has no material relationship with Praxair other than the Agreement.

Petitioner Grynberg has no connection to the matters at issue other than this lawsuit. Neither Nielson nor Praxair, nor their predecessors in interest, have ever employed Grynberg or engaged in business with him. Grynberg does not have, nor has he ever had, any "inside" information regarding Nielson, Praxair, Conoco, or LLC, or the CO_2 production involved in this proceeding. The United States, the real party in interest, declined to intervene.

B. The 1983 Agreement for the Sale and Purchase of Carbon Dioxide

For many years, Conoco, Nielson's predecessor, extracted and sold oil from the McCallum Fields and simply vented to the atmosphere (with the approval of federal regulatory authorities) raw CO_2 gas that was produced in conjunction with the oil. Since there were no close pipelines to transport the CO_2 to locations where it could be sold, there were no customers for the CO_2.

Conoco entered into a June 3, 1983 Agreement for the Sale of Carbon Dioxide ("Agreement") with LCC, Praxair's predecessor. Under the Agreement, LCC was obligated to construct a plant to process raw CO_2 gas produced and delivered by Conoco in order to purify and convert it into liquid CO_2 which is saleable for beverages, food processing and other uses. Conoco owned the CO_2 until the plant tailgate, at which point it was purchased by LCC.

The Conoco/LCC Agreement allowed Conoco to receive waste gas from two plant vents, but Conoco determined that only one of the vents yielded anything potentially sellable (i.e., hydrocarbon condensates) and therefore installed only one return line.

In 1992, LCC designed and installed a dry ice manufacturing facility at the plant. LCC initially intended to salvage, rather than vent, the CO_2 that inevitably turns to gas when making dry ice, but that proved economically infeasible because of the low volume and intermittent production.

Processing McCallum Fields' CO_2 into ultra-pure liquid CO_2 and dry ice necessarily involves shrinkage. Production data shows that on average 63.4% by weight of the feedstock of CO_2 Nielson supplies has been processed into liquid and dry ice products. Of the approximately 36.5% shrinkage between the inlet volume and plant products, approximately 4.5% consists of non-CO_2 impurities removed during processing with 32% being CO_2. Of the CO_2 shrinkage, 5.5% is returned to Nielson, with plant operations accounting for the remaining 26.5%.

C. Accounting and Payment Under the 1983 Agreement

The Agreement obligates Praxair to pay Nielson approximately $7.10 per ton of product shipped from the plant, adjusted annually to reflect market conditions. Liquid CO_2 and dry ice are shipped by trucks, which are weighed on certified scales connected to a computer that generates a delivery ticket for each shipment. Plant employees record shipments daily and generate a monthly "Production and Shipments Report" which details total

shipments of liquid CO_2 and dry ice. Praxair forwards the Production and Shipments Reports, together with the Delivery Tickets, to Nielson. The only measurement data Nielson relies on Praxair to provide is the volume by weight of products shipped from the plant and oxygen used in purification. The accuracy of measurement data that Praxair reports to Nielson is undisputed.

After receiving the Production and Shipments Report and support delivery tickets, Nielson invoices Praxair for the raw CO_2 gas delivered during the previous month based on the total shipments multiplied by the Agreement price. Praxair pays Nielson the amount invoiced.

The United States requires Nielson (and formerly Conoco), as lessees, to account for and pay royalties. Nielson determines the volume of royalty bearing gas according to the BLM-approved "plant tailgate" (product shipped) measurement (as outlined below). Nielson calculates the "sales quantity" by converting tons of CO_2 plant products to MCF and then the "royalty quantity" by applying the specified royalty rate. The reported "sales value" reflects gross proceeds under the Agreement allocated to each federal lease while the "royalty value" is determined by applying the specified royalty rate. Nielson pays royalties equal to the total "royalty value" of sales from the federal interests.

D. The Federal Royalty System

The Department of Interior ("DOI"), through the Minerals Management Service ("MMS") and the Bureau of Land Management ("BLM"), manages and protects the United States' mineral interests in federal leases, such as the federal leases Nielson has in the McCallum Fields.

Within DOI, BLM maintains responsibility for, among other things, approving the point of measurement for determining royalty bearing volumes of McCallum Fields gas, approving the venting (without royalty) of McCallum Fields gas, and ensuring that Nielson (and formerly Conoco) properly measures and reports gas produced from the McCallum Fields. The MMS has responsibility for determining the royalty value for gas produced from the McCallum Fields.

E. Government Approval of Nielson's Practices

Because the CO_2 was to be purchased from the plant tailgate, rather than the wellhead, and approximately 30% of the CO_2 was lost between the wellhead and the purchase point, Conoco requested approval of the Agreement by the BLM. The United States has known both the wellhead and royalty quantities, and the difference between them, since the mid-1980s, when Conoco began filing "Reports of Operations and Production" detailing gas volumes produced, sold and vented. The Department of Interior (through the BLM and the MMS) has been aware that substantial CO_2 from the McCallum field is vented without Nielson/Conoco paying royalty on the vented CO_2 since at least 1985.

On October 23, 1984, Conoco notified MMS of its Agreement with LCC. Conoco submitted the Agreement and an "Application for Establishment of Royalty Value" as well as a flow diagram noting gas flaring from LCC's plant. Conoco advised that it intended to calculate royalties based on proceeds received under the Agreement, at the prices negotiated, and on volumes determined by the amount of finished CO_2 products yielded by the raw gas

stream, as measured at the plant "tailgate." Conoco was not required to seek advance MMS valuation approval.

In mid-March, 1985, BLM wrote and called Conoco asking it to justify the LCC plant tailgate as an appropriate measurement location for royalty purposes. Conoco acknowledged BLM's plant loss concerns, but stated that Conoco believed the owners would benefit from the plant.

On April 4, 1985, the MMS approved CO_2 royalty values based on the arms-length contract price the parties had negotiated. The BLM approved Conoco's volume measurement and reporting methods.

The initial MMS audit of the McCallum Unit CO_2 production addressed concerns that the "majority of the CO_2 production was being vented from the plant." The MMS asked the BLM to provide a determination as to whether or not the venting of CO_2 could have been avoided. In response, the BLM explained that its conservation division had previously approved CO_2 venting, an approval the BLM did not want to rescind despite new CO_2 venting associated with the plant.

Subsequent audits or accountability inspections were conducted by the BLM in 1987, 1988, 1994, and 1996. In addition, the Colorado Department of Revenue Mineral Audit Section, on the DOI's behalf, audited Conoco's oil and gas production from 1992 through 1995. In all of these audits, it was noted that the volume of CO_2 at the wellhead was much greater than at the plant tailgate (where royalties were determined).

After the 1996 production accountability inspection, by mid-June 1996, the MMS was actively reviewing whether Conoco had properly paid royalties with respect

to the South McCallum Unit carbon dioxide and directing that Conoco recalculate, report and pay additional royalties. Conoco (and Nielson) faced, among other things, additional royalties and late payment charges. Nielson filed a Notice of Appeal with the MMS.

Following Nielson's appeal, BLM (at MMS direction) organized a meeting in Craig, Colorado, to investigate the tailgate measurement and shrinkage or loss of CO_2 at the plant. In addition to the BLM, Nielson and Praxair personnel, Mr. Ed Calvert from Nucor, attended the meeting. Nucor owns interests in certain of the McCallum Fields leases, but is otherwise unaffiliated with Nielson. Nielson handles the gas production and all royalty reporting and payment matters associated with the leases. Grynberg has not made any allegations against Nucor.

In an October 21, 1996 letter to the BLM, Nielson summarized the meeting and advised that "many of these plant processes use some of the CO_2, resulting in a 20-30% reduction in the eventual quantity of pure CO_2 available for sale." Nielson again requested approval (to the extent not previously approved) for royalty volume measurement at the plant outlet.

Based on its investigation, the BLM approved the plant tailgate measurement for all McCallum Fields CO_2 production (including the South McCallum Unit). To resolve any uncertainty, it made the approval retroactive to 1988 (when production from the South McCallum Unit began). The BLM understood that Praxair was paying Nielson, and that Nielson was paying royalties based on liquid CO_2 and dry ice volumes. The MMS thereafter withdrew its Order to Comply, closed Nielson's appeal, and declared Nielson to be in regulatory compliance.

Shortly after Grynberg filed his Complaint in 1998 (and apparently as a result of the Complaint), MMS yet again investigated the Agreement and Nielson's royalty payments. As before, MMS concluded that the Agreement is arm's-length, the base price received under it is acceptable for royalty purposes, and Nielson has properly paid royalties on the proceeds received.

Official representatives of both BLM and MMS have confirmed (under oath) their view that Grynberg's allegations against Nielson and Praxair regarding royalty underpayments are baseless.

The United States Attorney's office investigated Grynberg's allegations and determined them to be without factual support.

In June 2000, Nielson asked DOI to review and approve a follow-on Carbon Dioxide Purchase and Sale Agreement (the "Follow-On Agreement") between Praxair and Nielson that covers the McCallum Fields. The Follow-On Agreement largely mirrors the original arrangement, but reflects subsequent changes – changes that DOI has long known and approved of, but that Grynberg nevertheless complains about, *e.g.*, dry ice production. Nielson explicitly referenced Grynberg's FCA litigation in its cover letter seeking MMS review. Deborah Gibbs-Tschudy, Manager of the DOI, MMS, Royalty Management Program, again approved Nielson's royalty payment and measurement methods pursuant to the Follow-On Agreement (i.e., tailgate volumes and values based on contract proceeds). MMS found the Follow-On Agreement acceptable despite its specific recognition "that under normal operating conditions there may be significant and substantial losses of the CO_2 stream incurred in order to produce

finished product," and that these varying losses "may from time to time exceed fifty percent . . . of the CO_2 stream . . . delivered . . . to Praxair's Plant."

F. Grynberg's Investigation

Jack Grynberg is a petroleum engineer who is the president and co-owner of Grynberg Petroleum Company in Denver, Colorado. In 1997, Grynberg was trying to find a CO_2 supply for use in an oil field recovery project. One of the firms he called for prices was the Defendant, Praxair. Because Grynberg thought Praxair's prices were too high, he telephoned Jim Nielson, the President of Defendant, Nielson & Associates, Inc. Although Jim Nielson disputes Grynberg's version of the conversation, Grynberg alleges Jim Nielson complained that Praxair was taking 30 percent of the natural CO_2 produced from the McCallum Fields and using it as part of its processing operation without payment to Nielson. Grynberg also talked to Jim Williams, Nielson's chief operations officer, regarding the pricing arrangements between Nielson and Praxair. Based on these two brief telephone conversations, the contents of which are disputed, Grynberg claims to have begun an extensive investigation.

As part of his investigation, Grynberg filed a request under the Freedom of Information Act (FOIA) to acquire a copy of the Agreement between Praxair (formerly LCC) and Nielson (formerly Conoco) and other related documents, but his request for a copy of the Agreement was denied. Grynberg did receive four pages of a letter from the MMS to Conoco containing redacted information regarding the Agreement. Pet. App. 112a-115a.

Grynberg sent an employee to research the records at the Colorado Oil and Gas Conservation Commission "COGCC" office to learn the amount of Nielson's payment for conservation taxes on its CO_2 production. In addition, he referred to an industry publication of gas and oil production records. With these two public sources of information, Grynberg calculated Nielson's reported payments received for CO_2 and the royalties paid to the Government. Grynberg then made several phone calls inquiring about the reasonable market value of the CO_2 to end users and by visiting with operators of other plants. Grynberg also had one of his employees take pictures of the Praxair plant from a public road which showed that gas was being vented from the plant.

Grynberg concluded the volumes reported on Nielson's MMS forms 2014 and 3160 were fraudulent and did not reflect the actual gas production from the McCallum Fields, as Grynberg stated the MMS regulations require. While Grynberg conceded that the actual numbers reported to the Government throughout the life of the Agreement were accurate, he insisted the royalty submissions were knowingly false because Nielson and Praxair intentionally violated federal regulations by failing to pay royalties on wellhead production and by reducing the tailgate price through the deduction of processing costs.

II. PROCEDURAL BACKGROUND

On January 7, 1998, Grynberg filed a *qui tam* action under the False Claims Act, 31 U.S.C. §§3729 *et seq.*, against Nielson and Praxair. Grynberg claimed that Nielson and Praxair were liable under the so-called "reverse false claims" provisions of the False Claims Act,

namely 31 U.S.C. §3729(a)(7), for having made or caused to be made false records or statements for the purpose of decreasing royalty payments due under certain Federal leases in the McCallum fields. Grynberg claimed that both Defendants presented or caused to be presented false valuations of royalties owed to the Government for carbon dioxide production by understating the value of the CO_2 and by under-reporting the volume of the CO_2. *United States ex rel. Grynberg v. Praxair, Inc.*, 207 F.Supp.2d 1163 (D. Colo. 2001).

Defendants Nielson and Praxair filed separate motions for summary judgment. The district court granted summary judgment on the grounds that 1) there was no evidence to suggest either Defendant made "knowingly false" statements to the Government; 2) the court lacked subject matter jurisdiction because the *qui tam* action was based on publicly disclosed allegations or transactions; and 3) the claim was barred because it was premised on information known to the government prior to 1986. Both Nielson and Praxair moved for the payment of their attorney fees and costs. The district court ordered Grynberg to pay the Defendants' costs, but required each party to pay their own attorney fees. Nielson and Praxair both sought reconsideration of the district court's apportionment of attorney fees, maintaining that Grynberg's lawsuit was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment" under 31 U.S.C. §3730(d)(4). The district court denied reconsideration. Grynberg appealed the dismissal of his claim, and Praxair cross-appealed the denial of its request for attorney fees and expenses.

The Tenth Circuit affirmed the district court's conclusion that Grynberg failed to establish subject matter jurisdiction. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004). The Tenth Circuit stated the transactions of Conoco and Nielson which Grynberg alleged were fraudulent were publicly disclosed twice. It was first publicly reported when the MMS sent its response to Grynberg's Freedom of Information Act ("FOIA") request and second, at a 1996 meeting to discuss the Order to Comply, where the subject of the administrative investigation was "publicly disclosed" to Ed Calvert. The court did not reach the remainder of the issues presented in Grynberg's appeal.

The Tenth Circuit reversed the denial of attorney fees to Praxair and remanded. It ruled that Praxair was the "prevailing party" in the case and, although the district court did not have subject matter jurisdiction over the FCA claims, concluded that it did have jurisdiction to award attorney fees under the fee-shifting provisions of 31 U.S.C. §3730(d)(4).

Nielson now requests that this Court deny certiorari to review the ruling of the Tenth Circuit Court of Appeals. Grynberg has cited no compelling reasons for a writ of certiorari to be granted, and the decision of the Tenth Circuit is sound and is well within the decisions of this Court.

ARGUMENT

I. THE JURISDICTIONAL BAR OF 31 U.S.C. §3730(e)(4)(A) APPLIES TO THE RELATOR'S COMPLAINT BECAUSE THE RELATOR HAS SOLELY RELIED ON OFFICIAL DOCUMENTS/ DECISIONS IN THE PUBLIC DOMAIN

In his first two arguments in his Petition for Writ of Certiorari, Grynberg argues that there is deep conflict among the circuit courts regarding the meaning of "public disclosure" in the False Claims Act, and what "based upon the public disclosure" actually requires.

Section 3730(e)(4)(A) states that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

What Grynberg sees as a conflict among the circuit courts is more a perception of how the statute is applied in differing factual situations. The Tenth Circuit in the instant case applied a well-respected course of reasoning when determining that not only were Grynberg's allegations in the public domain, but that Grynberg was not an original source.

Grynberg bears the "burden of alleging facts essential to show jurisdiction under the False Claims Act as well as supporting those allegations by competent proof." *United*

States ex rel. Holmes v. Consumer Ins. Group, 318 F.3d 1199, 1202 (10th Cir. 2003) (en banc) (quoting *United States ex rel. Fine v. Advanced Sciences, Inc.,* 99 F.3d 1000, 1004 (10th Cir. 1996).

Grynberg essentially complains in his Complaint that Nielson misreported for royalty purposes both the value and volume of CO_2 gas produced from Federal leases by relying on respectively, (i) the contract price Praxair paid rather than the market price for manufactured CO_2 products that Praxair sells, and (ii) plant tailgate volumes rather than wellhead volumes. Two public disclosures of these same transactions on which Grynberg's claims are based preclude FCA jurisdiction.

First, in response to a Freedom of Information Act request, Grynberg received pages from a 1985 MMS letter describing the Agreement between Conoco and LCC (See Pet. App. 112a-115a). These documents resulted from the MMS' administrative investigation triggered by Conoco's request that its arrangement with LCC be approved. As the Tenth Circuit noted, the FOIA documents described the essence of Grynberg's claims:

> While the information provided to Grynberg redacted the precise numbers, it revealed the existence of the Agreement, the point of production (the wellhead), the liquification of the CO_2 through Liquid Carbonic's plant while Conoco still maintained possession of the gas, the purchase point (the tailgate), and the fact the price was adjusted at the tailgate. Grynberg's claim that the document did not state where the royalty would be valued is disingenuous. While the letter does not recite those facts in Grynberg's preferred form, it is written by the entity required to make a valuation judgment and it identified the purpose

> of the correspondence is to "approve Conoco's 'production reporting sequence' for carbon dioxide (CO_2)" and the attached "Application for the Establishment of Royalty Values". . . . Further, the heading on the pages produced identifies the remainder of the document as "Findings and Conclusions on Valuation of CO_2." In this context, the document identifies the tailgate as the location of pricing and the fact the price will undergo adjustments. The only reasonable conclusion from these statements is that the royalty will be valued at the point of sale, and such location may entail a loss of value in the base amount used for royalty calculations. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004).

The Tenth Circuit in the instant case stated that "a response to a request under the Freedom of Information Act is generally considered to be a public disclosure." *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723-24 (6th Cir. 1999); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519-20 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997).

The description of this transaction in the FOIA documents provided to Grynberg undeniably presented the proposed CO_2 production reporting sequence in a "questioning light." Yet in his Petition for Writ of Certiorari, Grynberg complains that the FOIA document gave "no hint of fraud, because the sale price was redacted from the document, the failure to gross up the price was invisible, and the fact that gas was vented was contrary to what the FOIA document itself said." Yet this same publicly disclosed transaction triggered a government investigation into the very concerns that Grynberg raises. When this

arrangement was first revealed, MMS responded: "we are concerned that, if royalty is to be paid on the volume of gas leaving the plant, there could be significant differences, due to plant losses, from the volumes the [wellhead] allocation meters indicate." What was publicly disclosed, therefore, "detailed the mechanics of the practice" and "alerted the government" to the issues Grynberg presents. *See United States ex rel. Fine v. Sandia Corp.*,70 F.3d 568, 572 (10th Cir. 1999) where the publicly disclosed information "set the government squarely on the trail of the alleged fraud without [the relator's] assistance, . . . it would be contrary to the purposes of the FCA to exercise jurisdiction over his claim." *Id.* Moreover, Grynberg admitted reliance on this disclosure of the FOIA documents to develop his claims. The Tenth Circuit, in its decision, outlined how Grynberg provided these very documents to the Department of Justice as "material evidence and information . . . relating to the substantive issues alleged in the Complaint." While Grynberg alleged more detailed values and volumes, his claims are nevertheless based on the same publicly disclosed transactions. *See United States ex rel. Fine v. Advanced Sciences., Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996), where it was stated that there should be a dismissal under the public disclosure bar if "any part" of the action is "supported by" the publicly disclosed transactions (citing *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996) (jurisdictional bar not overcome merely through allegations "more narrow and specific in scope" than public disclosures).

A second public disclosure likewise bars jurisdiction. The MMS 1996 Order to Comply investigation included a meeting to discuss reliance on tailgate volumes. The meeting was initiated specifically to address concerns over wellhead volumes unaccounted for due to use of plant tailgate measurement for royalty reporting. BLM's concerns, its prior approvals, and Nielson's request to approve this practice for gas from a different field were specifically considered. Thus, the same transaction underlying Grynberg's claim regarding underreported gas volumes – reliance on tailgate rather than wellhead volume – was disclosed at that meeting. Grynberg has conceded that his claim mirrors the Order to Comply issues.

There was no genuine issue that the meeting was attended by Ed Calvert from Nucor. Grynberg questions Mr. Calvert's status, but does not carry his burden to prove that Mr. Calvert was anything other than a "stranger to the fraud," such that disclosure to him of this transaction triggers the "public disclosure bar." *Advanced Sciences,* 99 F.3d at 1005-06 (disclosure to one person unconnected with the fraud is sufficient). Mr. Calvert's employment by a company that invested in the leases Nielson operates does not make the disclosure non-"public" for FCA purposes. Nothing in the record suggests any connection between either him or his company and the alleged fraud. To the contrary, the evidence is uncontested that Nielson operates the CO_2 wells and handles all royalty matters Grynberg references Nucor's investment interest, but cites no facts linking its employee (Mr. Calvert) to any involvement in or knowledge of the matters at issue.

Grynberg promotes the mathematical formula espoused by the D.C. Circuit in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994),

in an attempt to prevail on the jurisdiction issue. Yet the Tenth Circuit states that even under the *Springfield* analysis, Grynberg fails to establish jurisdiction. Pet. App. 21a.

No matter what circuit court's reasoning he uses, Grynberg cannot withstand the jurisdictional bar because his complaint is clearly based upon the list of public disclosures outlined in 31 U.S.C. §3730(e)(4)(a) regarding the Nielson/Praxair Agreement.

II. A RELATOR MAY NOT BE AN ORIGINAL SOURCE UNDER 31 U.S.C. §3730(e)(4)(B) WHEN THE ONLY KNOWLEDGE HE HAS GAINED IS FROM PUBLIC SOURCES AND HE HAS NO DIRECT AND INDEPENDENT KNOWLEDGE OF THE INFORMATION

Section 3730(e)(4)(B) states:

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Faced with qualifying pre-filing public disclosures of the very transactions on which Grynberg's claims are based, FCA jurisdiction in this case depends on Grynberg's status as an "Original source." Unsurprisingly, Grynberg ignores *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 9 F.Supp.2d 1273 (D. Kan. 1998), *aff'd*, 190 F.3d 1156 (10th Cir. 1999). *Hafter* recognized the relator's burden to "allege specific facts – as opposed to mere conclusions –

showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged . . . and support those allegations with competent proof." *Id.* at 1162. Although repeatedly recounting his investigation, Grynberg does not allege, much less prove, any "direct and independent knowledge."

Grynberg describes conversations with various third parties, phone calls to Praxair salesmen, FOIA requests, review of state records and industry publications, observations from public roads, all culminating in personal speculation about regulatory requirements and prices based on bits of data and conjecture. But, Grynberg is not an "insider" and described no personal source of knowledge about any allegedly fraudulent practices. His efforts to construct a claim do not establish "original source" status. *See, e.g., Hafter D.O.,* 190 F.3d at 1162-63 (no particularized facts regarding fraud the relator witnessed); *M-K Ferguson,* 99 F.3d at 1548 (relator who neither observed nor discovered the alleged fraud was not an original source); *United States ex rel. Aflatooni v. Kitsap Physicians Services,* 163 F.3d 516, 526 (9th Cir. 1999) (conjecture and speculation does not suffice); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.,* 985 F.2d 1148, 1159 (2nd Cir. 1993) (background knowledge insufficient when relator was not source of core information underlying complaint).

The most Grynberg did was to pursue information from public sources after allegedly learning information from insiders (Jim Nielson and/or Jim Williams). Secondhand knowledge and research is not the "direct and independent knowledge" required to be an "original source." *United States ex rel. Devlin v. State of California,* 84 F.3d 358, 361 (9th Cir. 1996), *cert. denied,* 519 U.S. 949

(1996) (relators who learned of wrongdoing from an insider and then conducted investigation did not have "direct" knowledge because they "did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but derived it second-hand from Coty, who had firsthand knowledge"); *United States ex rel. Koerner v. Crescent City E.M.S., Inc.*, 946 F.Supp. 447, 453 (E.D. La. 1996) (relator who learned of alleged misconduct from defendant's former employee did not have "direct knowledge" because he was "neither a close observer of or otherwise involved in the fraudulent activity . . . ").

In addition, to avoid the jurisdictional bar, "before filing the *qui tam* action, a relator must voluntarily provide the Government with the essential elements or information on which the *qui tam* allegations are based." *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001); 31 U.S.C. §3730(e)(4)(B). Grynberg has not met his burden to demonstrate the requisite pre-filing disclosure. Only after filing did his lawyers transmit the complaint to the Government, along with "copies of all the material evidence and information" in his possession. Those transmittals do not indicate any prior communication with the Government about his allegation, but instead suggest that Grynberg had not previously provided the required information. No written corroboration of any prefiling disclosure exists.

Indeed, the Tenth Circuit points out that in Grynberg's disclosure to the Government, Grynberg's "total submission of evidence in support of his allegations included the 1985 MMS letter and two memos: one written by Grynberg approximating the cost for a CO2 plant in Cortez, Colorado, and another by his employee, comparing

the prices at the Cortez plant and those at Praxair." Pet. App. 24a.

The Tenth Circuit stated that the burden was on Grynberg to show he is an original source. *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 800-02 Fed. Appx. 708 (10th Cir. 2002). To meet this burden, he must provide more than an "unsupported, conclusory allegation." *Id.* at 800. "Grynberg is required to iterate specific facts demonstrating his direct and independent knowledge is marked by the absence of an intervening agency . . . [and] Unmediated by anything but [his] own labor." *Kennard,* 363 F.3d at 1044.

III. A COURT THAT LACKS SUBJECT MATTER JURISDICTION UNDER THE FALSE CLAIMS ACT STILL HAS JURISDICTION TO AWARD ATTORNEY FEES UNDER 31 U.S.C. §3730(d)(4)

IV. A DEFENDANT WHO PREVAILS IN A FALSE CLAIMS ACT CASE DUE TO LACK OF SUBJECT MATTER JURISDICTION OF THE RELATOR IS A "PREVAILING PARTY" UNDER 31 U.S.C. §3730(d)(4)

While Nielson has no stake in the arguments presented in Paragraphs III and IV herein, because it did not cross-appeal the attorney fee decision of the district court, Nielson asserts that Praxair is entitled to attorney fees as outlined by the Tenth Circuit, and adopts and endorses Praxair's arguments presented in its Brief in Opposition to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioner's Petition for a Writ of Certiorari should be denied because his complaints about the "deep conflicts among the circuits – conflicts which have persisted for years and which will not be resolved without the attention of this Court" are illusory when applied to the instant case.

Grynberg looks to the Court for a hard and fast rule which will save this opportunistic Plaintiff's case. The Tenth Circuit refused to "adopt any bright-line rule disqualifying a relator as an original source when the relator examines public records." *Grynberg*, *supra*, at Pet. App. 27a. The court noted that "it is the character of relator's discovery and investigation that controls this inquiry" about whether an individual is an original source under any particular set of facts. Courts which examine the provisions of the false claims act, and specifically the jurisdictional bars, face a mixed bag of law and fact which must be applied on a case by case basis according to the statute.

The Tenth Circuit, not only in *Grynberg*, but in other cases, has relied on the principle that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *Koch* at 552 (*citing F & S Construction Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964), "the Tenth Circuit has reasoned that its limited interpretation of who could sue under the statute protected the incentive for private citizens with first-hand knowledge to expose fraud, but also prohibited civil actions brought by opportunists who do not contribute anything significant to the exposure of the fraud." *United States ex rel. Findley, v. FPC-Boron Employees' Club, et al.*,

105 F.3d 675, 682 (D.C. Cir.), *cert. denied,* 522 U.S. 865 (1997).

United States Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted only for compelling reasons. The cases Grynberg cites do not show decisions in conflict with the decisions of another United States court of appeals on the same important matter as required by subsection (a) of that same rule; nor does it show an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court as required by subsection (c) of the rule. Furthermore, no matter which circuit court Grynberg had ended up in, he would not have qualified as an original source.

The Tenth Circuit in the instant case examined a mixed question of law and uncontroverted facts to determine what information was in the public domain as required by the False Claims Act to determine whether there was a jurisdictional bar, and then examined all the uncontroverted facts to determine whether this individual relator was an original source.

Grynberg believes that he can set the bar exceedingly low to qualify as an original source. This is not the case and should be rejected.

CONCLUSION

The Petition for a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

CHRIS EDWARDS
SIMPSON, KEPLER & EDWARDS, LLC
THE CODY, WYOMING DIVISION OF
BURG SIMPSON ELDREDGE HERSH
& JARDINE, PC
P. O. Box 490
Cody, Wyoming 82414
307-527-7891
Attorney for Respondent Nielson & Associates, Inc.

(3)

Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

NO. 04-1363

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA *ex rel.*
JACK J. GRYNBERG

PETITIONER,

V.

PRAXAIR, INC. AND NIELSON & ASSOCIATES, INC.,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

---

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK D. COLLEY
Counsel of Record
CRAIG A. HOLMAN
KRISTIN E. ITTIG
CAMERON W. FOGLE
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 955-3000

Counsel for Respondent Praxair, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Praxair, Inc. ("Praxair") hereby states that it has no parent corporation. Praxair further states that no publicly held company owns ten percent or more of Praxair's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

TABLE OF APPENDICES vii

FACTUAL BACKGROUND 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR DENYING THE WRIT 4

I. A "Public Disclosure," From A Source Recognized Under The FCA, Revealed The Essential Elements Of The Fraud Alleged. 4

II. The Tenth Circuit Properly Held That Grynberg's Allegations Were "Based Upon" The Public Disclosure. 8

III. Grynberg Is Not An "Original Source." 12

IV. There Is No Reason For This Court To Review The Tenth Circuit's Ruling That Praxair Was A Prevailing Party Under The FCA. 14

V. There Is No Reason For This Court To Review The Tenth Circuit's Ruling That § 3730(d)(4) Permits An Award Of Attorneys' Fees To A Defendant That Succeeds In Dismissing A Frivolous FCA Claim Under § 3730(e)(4)(A). 18

VI. Other Reasons for Denying the Writ. 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Ass'n for Retarded Citizens v. Thorne,
68 F.3d 547 (2d Cir. 1995) 19

Austria v. Altmann,
541 U.S. 677, 124 S. Ct. 2240 (2004) 17

Branson v. Nott,
62 F.3d 287 (9th Cir.),
cert. denied, 516 U.S. 1009 (1995) ..... passim

Citizens for a Better Env't v. Steel Co.,
230 F.3d 923 (7th Cir. 2000),
cert. denied, 532 U.S. 994 (2001) 19

Cooper v. Blue Cross & Blue Shield,
19 F.3d 562 (11th Cir. 1994) 10

Farrar v. Hobby,
506 U.S. 103 (1992) 15, 17

Fed. Recovery Servs., Inc. v. United States,
72 F.3d 447 (5th Cir. 1996) 10

Finn v. United States,
856 F.2d 606 (4th Cir. 1988) 15

Hanrahan v. Hampton,
446 U.S. 754 (1980) 17-18

Hewitt v. Helms,
482 U.S. 755 (1987) 17-18

Horner v. Ky. High Sch. Ass'n,
206 F.3d 685 (6th Cir. 2000) 17-18

Hughes Aircraft Co. v. United States ex rel.
Schumer,
520 U.S. 939 (1997) 15-16

Jackson v. Chater,
94 F.3d 274 (7th Cir. 1996) 15

Keene Corp. v. Cass,
908 F.2d 293 (8th Cir. 1990) ..... passim

Miles v. California,
320 F.3d 986 (9th Cir. 2003) 15

Minn. Ass'n of Nurse Anesthetists
v. Allina Health Sys. Corp.,
276 F.3d 1032 (8th Cir.),
cert. denied, 537 U.S. 944 (2002) 10

Simpson v. Lear Astronics Corp.,
77 F.3d 1170 (9th Cir. 1996) 22

United States v. Bank of Farmington,
166 F.3d 853 (7th Cir. 1999) 11

United States ex rel. Barajas v. Northrop Corp.,
5 F.3d 407 (9th Cir. 1993),
cert. denied, 511 U.S. 1033 (1994) 21

United States ex rel. Biddle v. Bd. of Trs. of the
Leland Stanford Jr. Univ.,
161 F.3d 533 (9th Cir. 1998),
cert. denied, 526 U.S. 1066 (1999) 10

United States ex rel. Dingle v. BioPort Corp.,
388 F.3d 209 (6th Cir. 2004),
cert. denied, 125 S. Ct. 1708 (2005) 10
United States ex rel. Doe v. John Doe Corp.,
960 F.2d 318 (2d Cir. 1992)..... 10

United States ex rel. Findley v.
FPC-Boron Employees' Club,
105 F.3d 675 (D.C. Cir.),
cert. denied, 522 U.S. 865 (1997) 10

United States ex rel. Grynberg v. Praxair, Inc.,
207 F. Supp. 2d 1163 (D. Colo. 2001),
aff'd in part, rev'd in part, 389 F.3d 1038
(10th Cir. 2004)..... passim

United States ex rel. Grynberg v. Praxair, Inc.,
389 F.3d 1038 (10th Cir. 2004)..... passim

United States ex rel. Herbert v. Nat'l Acad. of Scis.,
No. 90-2568, 1992 W.L. 247587
(D.D.C. Sept. 15, 1992) 23

United States ex rel. McKenzie v. BellSouth
Telecommunications,
123 F.3d 935 (6th Cir. 1997),
cert. denied, 522 U.S. 1077 (1998) 10

United States ex rel. Mistick PBT v. Housing Auth.
of Pittsburgh,
186 F.3d 376 (3d Cir. 1999),
cert. denied, 529 U.S. 1018 (2000) 10

United States ex rel. Phipps
v. Comprehensive Cmty. Dev. Corp.,
152 F. Supp. 2d 443 (S.D.N.Y. 2001)..... 22-23

United States ex rel. Siller v. Becton, Dickinson & Co.,
21 F.3d 1339 (4th Cir.),
cert. denied, 513 U.S. 928 (1994) 10

United States ex. rel. Stewart v. Fleet Fin. Group,
No. 1:98cv75, 1999 U.S. Dist. LEXIS 13624
(S.D. Mich. Aug. 31, 1999), aff'd, 229 F.3d 1154
(6th Cir. 2000) 23

United States ex. rel. Stewart v. Fleet Fin. Group,
No. 1:98cv75, 1999 U.S. Dist. LEXIS 13624
(S.D. Mich. Aug. 31, 1999),
aff'd, 229 F.3d 1154 (6th Cir. 2000) 23

United States ex rel. Tingley v. 900 Monroe, LLC,
No. 1:02-cv-319, 2003 U.S. Dist. LEXIS 11630
(W.D. Mich. Jun. 13, 2003) 22

W.G. v. Senatore,
18 F.3d 60 (2d Cir. 1990) 19, 20

Willy v. Coastal Corp.,
503 U.S. 131 (1992) 22

STATUTES

20 U.S.C. § 1415(e)(4) 19, 21

20 U.S.C. §§ 1681 et seq. 20

28 U.S.C. § 1447(c) 20

28 U.S.C. § 1919 20

31 U.S.C. §§ 3729 et seq. ..... passim

42 U.S.C. § 1983 16

42 U.S.C. § 1988 20-21

OTHER MATERIALS

1 John T. Boese, Civil False Claims and Qui Tam Actions (2d ed. 2005) 23

TABLE OF APPENDICES

False Claims Act, 31 U.S.C. § 3730 .....1a

Findings and Conclusions regarding
Grynberg Protective Order by United
States District Court for the District
of Colorado dated Oct. 3, 2000 .....10a

FACTUAL BACKGROUND

Respondent Nielson & Associates, Inc. ("Nielson") produces carbon dioxide ("CO_2") gas from wells drilled on lands leased to it by the federal government. It sells this gas to Respondent Praxair, Inc. ("Praxair") under an arms-length contract. Praxair processes the raw gas into purified food-grade products (i.e., liquid CO_2 and dry ice), which it sells commercially. Under their contract, Praxair pays Nielson a price per ton for the CO_2 based on the volume of finished product that the raw CO_2 gas will yield (i.e., output measured at the processing plant "tailgate"). Nielson then calculates and pays royalties to the government based on the gross proceeds of its sales to Praxair. The U.S. Department of the Interior's Bureau of Land Management ("BLM") and Minerals Management Service ("MMS") have regulatory oversight responsibility for the CO_2 production and royalty activity. Petitioner Jack J. Grynberg ("Grynberg") brought this False Claims Act, 31 U.S.C. §§ 3729 et seq. (2005) ("FCA") action alleging that royalties had been fraudulently underreported because they were calculated on the basis of (i) plant tailgate volumes (rather than wellhead volumes), and (ii) the contract price Praxair paid (rather than the prices at which Praxair sells its food-grade products).

Ignoring or distorting many of these basic facts, Grynberg's Petition presents a "Factual Background" that is exceedingly misleading. In particular, Grynberg's description of "Government Involvement" alludes only to questions addressed during multiple government investigations of the same royalty reporting practices that Grynberg challenged. Omitted are the consistent and repeated approvals by responsible federal regulators of the identical activity that Grynberg's complaint labeled as fraudulent.

The undisputed, documented record confirms that the very practices to which Grynberg objects were assessed and approved by the government at least in 1985, 1987, 1989, 1996 and 2000. United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1044-46 (10th Cir. 2004); United States ex rel. Grynberg v. Praxair, Inc., 207 F. Supp. 2d 1163, 1067-73, 1178-79 (D. Colo. 2001), aff'd in part, rev'd in part, 389 F.3d 1038 (10th Cir. 2004). This is not merely an FCA case where the government declined to intervene and prosecute Grynberg's complaint. Instead, and unusually, in this case the cognizable federal authorities provided sworn testimony, with full knowledge of Grynberg's charges, that the Respondents have complied with all royalty regulations and that *there is no fraud.* Praxair, 207 F. Supp. 2d 1171-72. Grynberg's Petition thus asks the Court for a third chance to argue for why he should be allowed to sue *on behalf of the United States* in order to challenge conduct that the government has repeatedly and unequivocally approved.

The specific practices of which Grynberg complains – royalty value based on plant tailgate volume and the Nielson/Praxair contract price – were publicly disclosed before Grynberg filed his *qui tam* complaint. First, they were disclosed through a Freedom of Information Act ("FOIA") disclosure that the MMS made to Grynberg. In that disclosure, MMS provided Grynberg with the redacted text of a 1985 letter describing the challenged practices. The disclosed letter itself resulted from an administrative investigation of the challenged practices. Because it revealed the challenged practices (redacting only the specific price) the district court held that the FOIA response constituted a sufficient public disclosure to preclude the *qui tam* case from proceeding. Id. at 1183-84.[1]

---

[1] The District Court also held that through a 1996 investigation, the challenged practices were publicly disclosed to an individual who was previously unconnected to the practices. Id. at 1184.

It is irrefutable that the exact measurement and valuation practices to which he objects were publicly disclosed in the FOIA response before Grynberg filed his complaint. While Grynberg attempts to limit and discredit the FOIA response's import by describing it only in part (omitting its most pertinent disclosures) and mischaracterizing what it reveals, that same approach was correctly described by the Tenth Circuit as "disingenuous."[2] Praxair, 389 F.3d at 1051. Moreover, although Grynberg recites as "facts" various personal speculations that he converted into complaint allegations, he fails to report that in response to motions for summary judgment, following extensive discovery, he was unable to provide any substantiating evidence for these claims.

SUMMARY OF THE ARGUMENT

The genesis of Grynberg's petition for a writ of certiorari is a patently frivolous FCA action concerning publicly disclosed royalty practices under an arms-length contractual relationship between Praxair and Nielson that the government approved on numerous occasions. In short, as the Tenth Circuit ruled, Grynberg's FCA claim suffered fundamental factual and legal flaws, and was precisely the type of parasitic action that the attorneys' fee provision in 31 U.S.C. § 3730(d)(4) was designed to discourage. As such, judgment against Grynberg and the decision regarding

---

[2] As discussed below in connection with his characterization of the decisions in this and other cases, Grynberg continues before this Court a consistent pattern of unreliable advocacy. See Praxair, 207 F. Supp. 2d at 1186 n.22 (questioning authenticity of a "suspect" document purporting to be a pre-filing disclosure to the government that Grynberg produced only after discovery and after representing at the summary judgment hearing that there was no such evidence); Appendix at 17a (Magistrate describing as "incredible" and "far fetched" Grynberg testimony seeking to overcome a protective order).

sanctions under § 3730(d)(4) are neither questionable nor controversial and certainly do not warrant further review by this Court.

Despite this reality, Grynberg has made a final and desperate push to keep his action alive. In much the same way that he attempted to manufacture a fraudulent conspiracy between Praxair and Nielson, Grynberg now attempts to manufacture divisions in the circuits or important questions of federal law in order to justify this Court's intervention. He fails on both fronts. No court in any circuit would have allowed Grynberg's claim to proceed because he failed meet the threshold *qui tam* requirements set out in 31 U.S.C. § 3730(e)(4) under every circuit's interpretation of that provision. Similarly, no opinions conflict with the Tenth Circuit's application of the attorneys' fees provision in § 3730(d)(4). Moreover, the *only* party that would assign importance to the issues Grynberg raises in his petition is Grynberg himself, and that "importance" is limited to a self-interested desire to evade paying Praxair's attorneys' fees as a consequence of having brought a frivolous action.

REASONS FOR DENYING THE WRIT

I. A "Public Disclosure," From A Source Recognized Under The FCA, Revealed The Essential Elements Of The Fraud Alleged.

Grynberg's Petition seeks to invent a conflict between the Tenth Circuit's ruling in this case and the law in other jurisdictions. His first argument thus opens with a tour of various perceived FCA ambiguities and conflicts among the circuit courts, but none of them are implicated by this case. In fact, Grynberg's arguments never directly confront this case. There is no conflict between the Tenth Circuit's actual

application of the statute in this case and either the language of the FCA or the approach taken in other circuits.

Grynberg's first Question Presented for Review is framed as an inquiry into whether the FCA's "public disclosure" bar applies "when the Relator's complaint is drawn from sources or information which are not listed in 31 U.S.C. § 3730(e)(4) . . ." The implication is that Grynberg's complaint was not based on a listed source. Instead, Grynberg argues that the lower court invented some sort of new "public domain" test and denied jurisdiction because Grynberg relied on public information disclosed in sources other than those recited in the FCA. This is an entirely false premise, and misrepresents both Grynberg's complaint and the Tenth Circuit's reasoning.

The Tenth Circuit's actual analysis started by acknowledging the district court's holding that "the transaction underpinning Grynberg's allegations, valuation at the tailgate pursuant to the terms of the Agreement, was publicly disclosed twice. The first such disclosure was when the MMS sent its response to Grynberg's FOIA request." Praxair, 389 F.3d at 1049. The circuit court then explained the district court's finding that:

> [T]his disclosure revealed both the location at which the royalty would be measured (the tailgate) and how the price [charged to Praxair] would be calculated (a formula based on the adjusted fair market values), thus disclosing the basis of allegedly fraudulent transactions.

Id. Grynberg's Petition alludes to other facts in the FOIA response, but ignores this fundamental revelation.

Instead, Grynberg's Petition notes that the FOIA response described plant ownership and gas title, the fact of price adjustment, and processing steps. He claims that without the sales price and production details, the FOIA information does not describe a fraud. (Petition at 12-13.) Before the Tenth Circuit, however, Grynberg took a different approach, arguing that the FOIA response did not communicate the basis for his fraud claim because it did not include a specific statement that gas volume would be established for royalty purposes at the plant tailgate, and that gas valuation would be based on contract price rather than the price at which Praxair sold finished products. Praxair, 389 F.3d 1049-50.

The Tenth Circuit rejected Grynberg's analysis, explaining that the FOIA response alone "contained all the elemental aspects of the allegedly fraudulent transaction." Id. at 1050. The court explained that the FOIA response, even without showing specific prices "revealed the existence of the Agreement, the point of production (the wellhead), . . . the purchase point (the tailgate), and the fact that the price was adjusted at the tailgate. Grynberg's claim that the document did not state where the royalty would be valued is disingenuous." Id. at 1051. Again, assessing solely the FOIA response, the court concluded that:

> [T]he document identifies the tailgate as the location of pricing and the fact the price will undergo adjustments. The only reasonable conclusion from these statements is that the royalty will be valued at the point of sale, and such location may entail a loss of value in the base amount used for royalty calculations.

Id. Grynberg thus merely disagrees with the factual conclusions reached by the lower courts, and now seeks a

third level of factual review as to the nature of the FOIA response.

Grynberg's Petition also argues that the Tenth Circuit incorrectly relied on Grynberg's use of other publicly available information to support its holding that there had been a "public disclosure" barring the claim. In reality, the court found that this additional information would not overcome the fact that the FOIA disclosure itself was sufficient under the statute to bar the claim:

> Clearly, X (wellhead as opposed to tailgate volumes) and Y (purchase and price adjustment at the tailgate) were within the public domain [via the FOIA response]. Therefore, Grynberg's "additional information, even if nonpublic, cannot suffice to surmount the jurisdictional hurdles." All of the material elements of the fraudulent transaction were already in the public domain....[T]he transaction was publicly disclosed by a listed source[.]

Id. (citations omitted). Although Grynberg's Petition makes much of the fact that he added information to what the FOIA response disclosed, the Tenth Circuit unequivocally found that Grynberg's additional information was insufficient to overcome the fact that the underlying transaction was publicly disclosed through the MMS FOIA response.[3]

Grynberg may disagree with the court's appraisal of the FOIA information, but he is disingenuous once again to suggest that the Tenth Circuit invented a new "public domain

---

[3] Not only did the Tenth Circuit not conflict with analytical approaches of other circuits, it explained how Grynberg failed the public disclosure test even under the analytical approach from another circuit that Grynberg had advocated below. Praxair, 389 F.3d at 1049.

test," or that it relied on any standard or analysis in conflict with the FCA and all applicable precedents. The court did not rest on the fact that Grynberg supported his claim with other public information in addition to the FOIA response. Instead, it concluded that the FOIA response revealed the essential character of the transaction on which Grynberg's claim was premised (tailgate volume measurement; contract price values). Every circuit court to have considered the question (and every case Grynberg cites) applies the public disclosure bar to prohibit FCA claims when a public disclosure from a requisite source reveals the basis for the fraud.[4] There is no conflict between the Tenth Circuit's application of the statute and either the language of the FCA or the approach taken in other circuits.

II. The Tenth Circuit Properly Held That Grynberg's Allegations Were "Based Upon" The Public Disclosure.

Grynberg's second question presented for review is also based upon a distortion of the Tenth Circuit's analysis. Grynberg contends that the court rejected his complaint allegations by comparing them to information in the "public domain," instead of concluding that the complaint was "based upon" the FOIA revelations. The Tenth Circuit said unequivocally, however, that there is "no question that the information disclosed by the MMS is the basis for his claim." Praxair, 389 F.3d at 1052. Although the court noted the other information Grynberg presented, it concluded that the complaint was based on the material released by the MMS pursuant to the FOIA. Id.

---

[4] Grynberg does not dispute that the FOIA disclosure constitutes a listed source in the FCA. (Petition at 12.)

Quoting the Tenth Circuit's decision out of context, Grynberg ignores the court's conclusion that the key element of the alleged fraud is "valuation at the tailgate," which was disclosed in the FOIA response. Id. The court's analysis did not cover any "gap" by reference to other information sources, as Grynberg argues. Instead, the Court assessed the evidence that Grynberg submitted to the government in support of his allegations, consisting of (a) the MMS FOIA response, and (b) two memos regarding plant costs and product prices that "do not change the basis for his allegations." Id. Thus, the only evidence upon which Grynberg purported to base his allegations was the FOIA material, leading the court to conclude that "Grynberg's complaint is based on a publicly disclosed transaction under 31 U.S.C. § 3730(e)(4)(B)." Id. In other words, the court's "based upon" analysis rested entirely on "the information disclosed by the MMS," and then discounted the relevance to the complaint allegations of the other public information Grynberg relied upon. There was no newly invented "public domain test" applied.[5]

Moreover, Grynberg's contention that the Tenth Circuit's decision rests on "deep divides among the circuits" is illusory. Grynberg suggests that there is a stark contrast between those circuits that treat the FCA's "based upon" test as meaning "supported by" and those circuits viewing that

---

[5] Grynberg's allusion to "venting" is more distortion. Grynberg's allegations were based on any differences between wellhead and tailgate volumes, whether due to venting, other plant or processing losses, or removal of non-CO_2 gasses. His Amended Complaint alleged an improper processing deduction, with venting issues coming into play only later. Praxair, 207 F. Supp. 2d at 1175. His claim was that royalty volumes, in order not to be reported unlawfully, had to be measured exclusively at the wellhead. As the court below noted, neither his complaint, nor his report to the U.S. Attorney rested on allegations related to venting, regardless of the source of that information. Praxair, 389 F.3d at 1052.

language as meaning "derived from." (Petition at 18.) The Tenth Circuit's treatment of the FCA's "based upon" test, however, is in accord with the vast majority of courts of appeals. Eight circuits agree with the Tenth Circuit that the "based upon" test means "supported by." See United States ex rel. Dingle v. BioPort Corp., 388 F.3d 209 (6th Cir. 2004), cert. denied, 125 S. Ct. 1708 (2005); Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1045-47 (8th Cir.), cert. denied, 537 U.S. 944 (2002); United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 385-88 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000); United States ex rel. Biddle v. Bd. of Trs. of the Leland Stanford Jr. Univ., 161 F.3d 533, 539 (9th Cir. 1998), cert. denied, 526 U.S. 1066 (1999); United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 688-89 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997); Fed. Recovery Servs., Inc. v. United States, 72 F.3d 447, 451 (5th Cir. 1996); Cooper v. Blue Cross & Blue Shield, 19 F.3d 562, 567 (11th Cir. 1994); United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992).[6]

Only two circuits have had a slightly different treatment. The Fourth Circuit has read the "based upon" language in § 3730(e)(4)(A) to mean "derived from." See United States ex rel. Siller v. Becton, Dickinson & Co., 21 F.3d 1339, 1348-49 (4th Cir.), cert. denied, 513 U.S. 928 (1994). The Siller decision, however, was predicated upon a finding that the relator did not rely on the publicly disclosed information.

---

[6] This Court has refused to grant certiorari on this issue several times in the past. See, e.g., Mistick, 186 F.3d at 385-88, cert. denied, 529 U.S. 1018 (2000); United States ex rel. McKenzie v. BellSouth Telecommunications, 123 F.3d 935, 939-41 (6th Cir. 1997), cert. denied, 522 U.S. 1077 (1998); Findley, 105 F.3d at 688-89, cert. denied, 522 U.S. 865 (1997). Grynberg provides no novel or compelling reason for a different result here.

By his own admission, Petitioner relied on the FOIA response.[7] Similarly, the Seventh Circuit in dicta noted that the "derived from" definition of "based upon" was compelling, but found it unnecessary to make a definitive ruling because the complaint failed under either definition of "based upon." See United States v. Bank of Farmington, 166 F.3d 853, 863-64 (7th Cir. 1999). Such passing and inconsequential differences certainly do not warrant this Court's intervention.

Even if the Court agrees that there are "deep divides among the circuits" regarding the FCA's "based upon" test, such a division would have no impact on Grynberg's case. The supposed significance of the distinction between circuits, such as the Tenth Circuit, that treat the FCA's "based upon" test as meaning "supported by" and those that view the language as meaning "derived from" is that the latter hold the public disclosure bar to operate only when there has been an intentional use of the publicly disclosed information. A complaint thus would not be barred if the relator was unaware of the publicly disclosed information when the complaint was filed, even if that complaint would be "supported by" the public disclosure. As far as Grynberg is concerned, however, this analysis is entirely theoretical. The public disclosure on which the Tenth Circuit's "based upon" analysis relied was the public disclosure that Grynberg knew about and, by his own admission, relied upon to develop his Complaint. Thus, his claim would be subject to

---

[7] A few days after filing his Complaint, Grynberg sent a copy of the complaint to the U.S. Attorney for Colorado and to the U.S. Attorney General, along with "copies of all of the material evidence and information which Mr. Grynberg possesses relating to the substantive issues alleged in the Complaint." Praxair, 207 F. Supp. 2d at 1174. The FOIA response was part of the "material evidence and information" that Relator forwarded to the government. Id. at 1184 n.21. Thus it is undisputed that the FCA complaint was based on sources that are listed in 31 U.S.C. § 3730(e)(4).

the public disclosure bar under every circuit's application of the FCA's limitation. There is simply no circuit conflict presented by the circumstances of this case that commands Supreme Court review.

III. Grynberg Is Not An "Original Source."

Grynberg's third question for review rests on the false premise that the public disclosure in the MMS FOIA response did not describe the essential elements of the transaction that Grynberg challenges. Both the district and circuit courts below understood and articulated that the fundamental transaction underlying Grynberg's complaint was that CO_2 was being measured at the plant tailgate rather than at the wellhead, and valued based on the contract price that Praxair paid Nielson for the raw gas rather than the price at which Praxair sold finished, processed products. Praxair, 389 F.3d at 1046-47, 1051; Praxair, 207 F. Supp. 2d at 1183-84. Because Grynberg cannot deny that this essential transaction was publicly disclosed in the MMS FOIA response, and that Grynberg was not the original source of that information, his petition resorts to further dissembling.

After elaborating on the additional information he developed to support his claims (Petition at 19), Grynberg challenges the Tenth Circuit as unduly restricting *qui tam* actions based on information learned from others (rather than on "direct" knowledge) (Petition at 20-21), or on publicly available information (rather than on "independent" knowledge) (Petition at 21-22). In particular, Grynberg complains that, in other circuits, a relator may rely on "direct and independent knowledge" to qualify as an original source, provided that the relator is not relying on the public disclosure. Grynberg's assessment of what the other circuits permit, however, is entirely consistent with the Tenth Circuit's analysis in this case.

There is no question that Grynberg added further details to his complaint allegations based on information that he collected from other sources. Consistent with the law elsewhere, the Tenth Circuit has held that "knowledge of the precise fraudulent submission to the Government is not necessary." Praxair, 389 F.3d at 1053. The Tenth Circuit has similarly declined to restrict original source status only to insiders, or to disqualify a relator who examines and relies upon public records. Id. What the Tenth Circuit does require, like all other circuit courts, is that the complaint not rely on a government disclosure detailing the factual underpinnings of the case. Id. at 1053-54.

Consistent with the precedent everywhere, the Tenth Circuit contrasted Grynberg with a relator who "ferreted out the alleged fraud" and "did not rely on a Government report dealing with allegations and transactions on which the current *qui tam* action is based because no such document existed." Id. at 1054. The court said "Grynberg's knowledge . . . was not independent. Unlike [a relator found to be an original source], he relied on a publicly disclosed Government document revealing the transaction forming the basis of his claim—the 1985 MMS letter [disclosed pursuant to FOIA] . . ." Id. That essential component alone takes Grynberg's claim out of the "direct and independent knowledge" category necessary for original source status. That all of his other information was derived from third parties and public sources merely confirmed that "the character of Grynberg's discovery and investigation is insufficient to qualify him as an original source." Id.

Importantly for the Court's decision on whether this case merits a grant of certiorari, Grynberg also fails the second prong of the original source test. In order to be an original source of publicly disclosed information, not only must a

relator have direct and independent knowledge of the information on which the allegations are based, the relator must also voluntarily provide that information to the government before filing a *qui tam* complaint. Although the Tenth Circuit did not reach this question, the district court did and the pertinent facts are not in dispute.

Grynberg filed his initial Complaint on January 7, 1998. Grynberg did not provide the government with the "information on which the allegations are based" until two days later. Thus, as the District Court explained, Grynberg "did not make the jurisdictional pre-filing disclosures required by the FCA." Praxair, 207 F. Supp. 2d at 1185-86.

Grynberg's arguments regarding original source are moot; even if he were correct (and he is not), the result will not change. Grynberg has not met the jurisdictional hurdles, and this failure is based on his own failure to follow the statute, not on any court's interpretation and application of the FCA.

IV. There Is No Reason For This Court To Review The Tenth Circuit's Ruling That Praxair Was A Prevailing Party Under The FCA.

Grynberg's Petition does not allege a valid basis for this Court to review the Tenth Circuit's ruling concerning Praxair's prevailing party status. Although the Petition's concluding paragraph asserts that this Court should settle the "conflict between the circuits over whether dismissal for lack of subject matter jurisdiction alters the legal relationship between the parties such that a defendant becomes a 'prevailing party' under the FCA or comparable fee-shifting statutes," (Petition at 28) the purported circuit conflict is dubious. Indeed, Grynberg admits that no other circuit court opinions have addressed whether a defendant securing

dismissal of an FCA action based upon the jurisdictional limitations in § 3730(e)(4) is a prevailing party under the attorneys' fees provision in § 3730(d)(4). Nonetheless, Grynberg attempts to manufacture a circuit split by focusing on distinguishable cases decided outside of the FCA context.

Quoting Farrar v. Hobby, 506 U.S. 103, 111 (1992), Grynberg acknowledges that "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." (Petition at 26-27.) Grynberg, however, never discusses whether the dismissal of his claim pursuant to § 3730(e)(4) materially altered the his legal relationship with Praxair. Instead, citing a series of cases in which claims were dismissed on procedural grounds, Grynberg attempts to extrapolate a blanket rule that there is no prevailing party in a case dismissed for lack of subject matter jurisdiction. Only two of the cases Grynberg cites, Branson v. Nott, 62 F.3d 287 (9th Cir.), cert. denied, 516 U.S. 1009 (1995) and Keene Corp. v. Cass, 908 F.2d 293 (8th Cir. 1990) involve defendants who successfully had a claim dismissed on jurisdictional grounds.[8] In both of those

---

[8] The other cases upon which Grynberg relies are factually inapposite. Finn v. United States, 856 F.2d 606 (4th Cir. 1988) concerned whether a *plaintiff* whose case was dismissed for lack of subject matter jurisdiction was a prevailing party under the "catalyst" theory (allowing plaintiffs to seek attorneys' fees where their unsuccessful legal actions were a catalyst for the change sought in the actions). Similarly, in Jackson v. Chater, 94 F.3d 274 (7th Cir. 1996), the issue was whether a *plaintiff* who succeeded in having her social security case remanded to an ALJ for further proceedings was a prevailing party under the Equal Access to Justice Act. Finally, in Miles v. California, 320 F.3d 986, 988-89 (9th Cir. 2003), the court ruled that a defendant who obtained dismissal of a claim based upon Eleventh Amendment immunity was a prevailing party, but stated only in dicta that the defendant would not have been a prevailing party if the underlying action were dismissed for lack of subject matter jurisdiction. Accordingly, these decisions neither conflict with the Tenth Circuit's ruling or undermine its validity.

cases, the courts dismissed actions brought under 42 U.S.C. § 1983 because the actions sought impermissible federal review of a state court decision. Grynberg's reliance on these cases is misplaced, however, because dismissal under 31 U.S.C. § 3730(e)(4) is fundamentally different than the dismissals in Branson and Keene.

Until 1986, the FCA required district courts to dismiss *qui tam* actions that were based upon information that the Government had when the action was brought. See Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 945 (1997). Congress, however, amended the FCA to permit *qui tam* actions based upon the information in the government's possession, so long as the information had not been publicly disclosed or, if it had been, that the party bringing the action was the original source of that information. 31 U.S.C. § 3730(e)(4)(A). Congress described the original source and public disclosure limitations in jurisdictional terms, stating that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." Id. Despite being labeled "jurisdictional," this Court has recognized that the limits imposed by § 3730(e)(4) are substantive and impact the legal rights of the parties:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 [FCA] amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none

> previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well.

Hughes, 520 U.S. at 951, accord Austria v. Altmann, 541 U.S. 677, 124 S. Ct. 2240 n.15 (2004).

Thus, unlike Branson and Keene, where the courts' dismissals for want of subject-matter jurisdiction concerned the proper forum for the claims asserted (state versus federal), the Tenth Circuit's dismissal of Grynberg's claim pursuant to § 3730(e)(4) involved his substantive rights and materially altered the legal relationship of the parties. Instead of ruling that Grynberg's claim was not before the proper body, the Tenth Circuit ruled that Grynberg had no legal entitlement to bring any FCA claim in any forum. Applying the rule set out by this Court in Farrar, the Tenth Circuit held that:

> [T]he result of the district court's summary judgment decision materially changed the legal relationship between Grynberg and Praxair. Grynberg's campaign to declare Praxair an entity "causing" a false claim to be made has reached final resolution. As Grynberg is now prohibited from bringing further claims on these facts, Praxair is a prevailing party.

Praxair, 389 F.3d at 1057. Accordingly, the Tenth Circuit's ruling is neither at odds with other decisions, nor legally flawed.

Citing Hewitt v. Helms, 482 U.S. 755, 760 (1987), Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) and Horner v. Kentucky High School Ass'n, 206 F.3d 685, 698 (6th Cir. 2000), Grynberg asserts that Praxair also must have some success "on the merits" in order to be a prevailing party

under § 3730(d)(4). In all three of these cases, however, the issue was what level of success a civil rights *plaintiff* must achieve in order to be considered a prevailing party under 42 U.S.C. § 1988. Unlike a plaintiff, the objective of a defendant is the dismissal of an action without a finding of liability. Accordingly, a defendant can "prevail" without a decision on the merits. Moreover, even if this Court agrees with Grynberg's position, dismissal under 31 U.S.C. § 3730(e)(4)(A) would qualify as a decision on the merits. That section sets out substantive requirements for a *qui tam* claim—that the claimant is the original source of the information underlying his or her claims or that the information was not publicly disclosed. In this case, the district court and Tenth Circuit ruled against Grynberg because he failed to prove that substantive element.

V. There Is No Reason For This Court To Review The Tenth Circuit's Ruling That § 3730(d)(4) Permits An Award Of Attorneys' Fees To A Defendant That Succeeds In Dismissing A Frivolous FCA Claim Under § 3730(e)(4)(A).

As with the prevailing party issue, Grynberg concedes the absence of conflicting decisions concerning the impact of a dismissal for want of jurisdiction on the attorneys' fees provision in § 3730(d)(4). Although Grynberg asserts that the Tenth Circuit's ruling on this issue raises "important questions of federal law," his discussion of the alleged importance is limited to a partial quotation of Supreme Court Rule 10(c). Grynberg never explains why the Tenth Circuit's ruling concerning the interplay between the substantive requirements set out in § 3730(e)(4) and the attorneys' fee provision for frivolous claims in § 3730(d)(4) is important enough to warrant review. Moreover, the importance Grynberg assigns to the Tenth Circuit ruling is completely at odds with the history of those provisions as set out in his

Petition. Grynberg suggests that legions of decisions have scrutinized § 3730(e)(4), but admits that in the 19 years since Congress amended the FCA to add that restriction, the Tenth Circuit is the *only* federal appellate court to examine whether dismissal under § 3730(e)(4) prohibits an award of attorneys' fees under § 3730(d)(4).

In an effort to cloud the issues and evoke images of conflict and error, Grynberg claims that the Tenth Circuit's ruling and Citizens for a Better Environment v. Steel Co., 230 F.3d 923 (7th Cir. 2000), cert. denied, 532 U.S. 994 (2001), a case upon which the Tenth Circuit relied, are at odds with other circuit's rulings. The four allegedly contradictory cases, however, do not involve the FCA and are readily distinguishable. Three of the cases concern requests for prevailing-party attorneys' fees under 42 U.S.C. § 1988. See Branson, 62 F.3d at 291; Ass'n for Retarded Citizens v. Thorne, 68 F.3d 547 (2d Cir. 1995); Keene, 908 F.2d at 296. The fourth case, W.G. v. Senatore, 18 F.3d 60 (2d Cir. 1990), concerns 20 U.S.C. § 1415(e)(4)(B), an attorneys' fees provision in the Individuals with Disabilities Education Act ("IDEA").

In each of the four cases, the courts focused on the structure or language of the particular statute at issue and did not purport to establish a blanket rule for attorneys' fees awards in cases dismissed for lack of subject matter jurisdiction. In Branson and Keene, both courts based their rulings on the fact that "section 1988 does not by its terms confer subject matter jurisdiction upon federal courts, but rather relies on provisions of other federal statutes . . . to confer jurisdiction." Branson, 62 F.3d at 293; Keene, 908 F.2d at 298. At the same time, the courts recognized that an absence of subject matter jurisdiction might not preclude an award of attorneys' fees in other contexts. See Branson, 62 F.3d at 293 n.9 (recognizing "some circumstances in which

attorneys' fees or costs may be imposed even where the court proves to be without subject matter jurisdiction," including under 28 U.S.C. §§ 1919 and 1447(c)); Keene, 908 F.2d at 298 n.6 (reserving judgment "on the propriety of awarding attorneys' fees under Federal Rule of Civil Procedure Rule 11 in instances where the lawsuit must be dismissed for lack of subject matter jurisdiction").

Similarly, in Senatore, the court focused on language in the IDEA that "specifically limits judicial discretion to award attorneys' fees to 'any action or proceeding brought under this subsection.'" 18 F.3d at 64-5. The court recognized, however, that attorneys' fees could be awarded in the absence of subject matter jurisdiction under Federal Rule of Civil Procedure 11, 28 U.S.C. § 1919 and 28 U.S.C. § 1447(c). Id. at 64 n.1. Accordingly, the conflict that Grynberg alleges would exist only if § 3730(d)(4) was analogous to the fee provisions in § 1988 and the IDEA, an erroneous proposition that Grynberg never even asserts.[9]

Section 1988 is a general fee-shifting statute that permits courts to award attorneys' fees to a prevailing party in claims brought under a variety of federal civil rights statutes.[10] As

---

[9] In Thorne, the fourth case upon which Grynberg relies, the court simply relies on the holding in Branson, Keene and Senatore. See Thorne, 68 F.3d at 552.

[10] "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. §§ 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. §§ 2000bb et seq.), the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. §§ 2000cc et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held

recognized in Branson and Keene, § 1988 is separate from the statutes to which it applies, and relies upon those statutes as a basis for subject matter jurisdiction. See Branson, 62 F.3d at 293; Keene, 908 F.2d at 298. Section 1415(e)(4)(B) of the IDEA permits a court to "award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party" in an action or brought under the IDEA. 20 U.S.C. § 1415(e)(4)(B). The section applies only to prevailing *plaintiffs* and thus dismissal for lack of subject matter jurisdiction unquestionably precludes an award of attorneys' fees under § 1415(e)(4)(B).

By contrast, the fee provision in § 3730(d)(4) and the "jurisdictional" provision in § 3730(e)(4) are inextricably bound and designed to work in tandem. Congress added both sections to the FCA at the same time and intended that § 3730(d)(4) protect defendants against potential abuses created by § 3730(e)(4)'s expansion of FCA claims. See United States ex rel. Barajas v. Northrop Corp., 5 F.3d 407, 410 n.9 (9th Cir. 1993) ("To balance the incentive to bring suit provided by the "original source" and damages provisions, Congress authorized the award of attorneys' fees and expenses to prevailing defendants if an action is frivolous, harassing, or vexatious."), cert. denied, 511 U.S. 1033 (1994). Accordingly, unlike § 1988 and § 1415(e)(4)(B), § 3730(d)(4) is specifically designed to protect defendants from parasitic plaintiffs bringing frivolous claims.

In addition, because § 3730(d)(4) only applies to cases that are "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment," fee awards under this

---

liable for any costs, including attorneys' fees, unless such action was clearly in excess of such officer's jurisdiction." 42 U.S.C. § 1988(b).

section are in the nature of Rule 11 sanctions. See Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1177 (9th Cir. 1996) (ruling that the test for awarding fees under § 3730(d)(4) is the same as the test for imposing Rule 11 sanctions); United States ex rel. Tingley v. 900 Monroe, LLC, No. 1:02-cv-319, 2003 U.S. Dist. LEXIS 11630 (W.D. Mich. Jun. 13, 2003) (describing fees under §3730(d)(4) as sanctions); United States ex. rel. Stewart v. Fleet Fin. Group, No. 1:98cv75, 1999 U.S. Dist. LEXIS 13624 (S.D. Mich. Aug. 31, 1999) (same), aff'd, 229 F.3d 1154 (6th Cir. 2000)). This Court has recognized the authority of district courts to award Rule 11 sanctions after dismissing an underlying action for lack of subject matter jurisdiction, see Willy v. Coastal Corp., 503 U.S. 131 (1992), and that same authority supports the Tenth Circuit's ruling in this case.

Finally, even if it were generally inappropriate for a district court to award attorneys' fees after dismissing an underlying action for lack of subject matter jurisdiction, the Tenth Circuit's ruling would still be appropriate. As explained above, describing § 3730(e)(4) as "jurisdictional" is somewhat of a misnomer because that section establishes substantive requirements for qui tam actions. Accordingly, dismissal under that provision is not merely a finding that a claim is not properly before the district court, but is also a ruling that the plaintiff cannot prove essential elements of his or her case. In light of these differences, Branson, Keene, Senatore and Thorne are not at odds with the Tenth Circuit's decision.

Although the Tenth Circuit is the only federal appellate court to issue an opinion concerning the propriety of awarding attorneys' fees under § 3730(d)(4) in an FCA case dismissed under § 3739(e)(4), all of the lower court decisions addressing this issue support the Tenth Circuit's ruling. See United States ex rel. Phipps v. Comprehensive

Cmty. Dev. Corp., 152 F. Supp. 2d 443, 455-56 (S.D.N.Y. 2001) (permitting defendant to file an application for fees under § 3730(d)(4) in case dismissed for lack of subject matter jurisdiction); United States ex rel. Herbert v. Nat'l Acad. of Scis., No. 90-2568, 1992 W.L. 247587, at *7-*9 (D.D.C. Sept. 15, 1992) (awarding attorneys' fees under § 3730(d)(4) and Federal Rule of Civil Procedure 11 in case dismissed under § 3730(e)(4); see also 1 John T. Boese, Civil False Claims and Qui Tam Actions § 4.09[B][2], at 4-196.4-197 (2d ed. 2005) (citing United States ex. rel. Stewart v. Fleet Fin. Group, No. 1:98cv75, 1999 U.S. Dist. LEXIS 13624 (S.D. Mich. Aug. 31, 1999), aff'd, 229 F.3d 1154 (6th Cir. 2000)). This support, combined with the total lack of conflicting decisions, renders review by this Court of the Tenth Circuit's decision unnecessary.

VI. Other Reasons for Denying the Writ.

Other issues not raised in the Petition also indicate that this case is not appropriate for Supreme Court review.

In addition to finding that Grynberg's action was based on a public disclosure for which Grynberg was not the original source, the District Court also found 1) that Grynberg failed to show that respondents made any knowingly false statement, and 2) that the claims were known to the government prior to 1986, when the statutory scheme provided that the government's knowledge of a claim negated the requisite intent. Praxair, 207 F. Supp. 2d at 177-82.

FCA liability may be imposed only on a person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the government. . ." 31 U.S.C. § 3729(a)(7). On consideration

of Praxair's and Nielson's motion for summary judgment, the district court found that royalties based on disclosed and approved practices cannot reasonably be treated as "knowingly false" statements meant to reduce royalty obligations, and granted summary judgment on that basis. Praxair, 207 F. Supp. 2d at 1180-81. Thus, even if Grynberg is correct on every issue presented regarding the public disclosure bar and the original source exception, the case result does not change.

Moreover, the FCA is designed to reach fraud against the government. An FCA case that is appropriate for Supreme Court review should be one in which there is at least a possibility of fraud against the government that might go unchecked without further Court intervention. That scenario is not present here. From the outset, the respondents and their predecessors have made the government fully aware of their gas measurement practices, and the government has approved those practices. Id. Being fully apprised of the respondents' practices, the government confirmed that it was "comfortable with the procedures that are being used to measure, process and maximize recovery of the CO_2 produced by these [McCallum] units." Id. at 1170-71.

BLM and MMS personnel testified under oath that they were fully aware of the relevant facts. Id. at 1171. In November 2000, while Grynberg 's case was in full swing, and after having been apprised of the "extra" information that Grynberg brought to the table regarding the alleged fraud, MMS once again approved the challenged practices. Id. at 1172-73. It could not be any clearer that the government does not believe fraud has occurred. In light of the government's explicit approval of the challenged practices, there is simply no reason for this Court to devote its resources to yet another review.

Grynberg has drawn this case out long enough. The district court found no evidence that Praxair had any involvement whatsoever in the challenged royalty calculations, reports or payments. Id. at 1186. As such, Praxair should not even be a part of this litigation.[11] Nevertheless, Grynberg has persisted in pursuing Praxair, and forced it to expend large sums defending against a frivolous case. Now Grynberg seeks to extend that run to yet another forum, and has again forced respondent Praxair to respond to the same tired arguments. It is time to end this odyssey.

CONCLUSION

The petitioner has received ample due process and justice has been done in the underlying case. The court of appeals followed settled principles of law in affirming the district court's judgment, without creating any conflict with other precedents. Even if the alternative tests proposed by the Grynberg were used, his claims would have been dismissed. In addition, Grynberg cites no authority that conflicts with or undermines the Tenth Circuit's interpretation of the FCA's attorneys' fee provision. For all the reasons discussed above, the petition for certiorari should be denied.

---

[11] For this reason, the Tenth Circuit remanded the case for further proceedings (now pending) on whether Praxair should be awarded fees because Grynberg's action was frivolous. Praxair, 389 F.3d at 1058-59.

May 13, 2005

Respectfully submitted,

MARK D. COLLEY
Counsel of Record
CRAIG A. HOLMAN
KRISTEN E. ITTIG
CAMERON W. FOGLE
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 955-3000

Counsel for Respondent Praxair, Inc.

False Claims Act, 31 U.S.C. § 3730

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General.— The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after

the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to Qui Tam Actions.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if

the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the

Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or

conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam Plaintiff.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting

the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing

the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government Not Liable for Certain Expenses.— The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant.— In civil actions brought under this section by the United States, the provisions of section 2412 (d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action

in the appropriate district court of the United States for the relief provided in this subsection.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 98-D-16

UNITED STATES OF AMERICA, ex rel JACK J. GRYNBERG,

Plaintiff(s),

vs.

PRAXAIR, INC. and NIELSON & ASSOCIATES, INC.,

Defendant(s).

FINDINGS AND CONCLUSIONS REGARDING GRYNBERG PROTECTIVE ORDER

ORDER ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

On September 20, 1999, I entered a Protective Order which prevented Jack Grynberg, the Relator ("Grynberg"), from obtaining access to Praxair's confidential and proprietary business and technical information. On March 1, 2000, I

denied Grynberg's motion for reconsideration, and Grynberg filed an Objection with District Judge Wiley Y. Daniel. On June 8, 2000, Judge Daniel conducted a hearing, and found that my ruling was supported only by "general conclusions." He has referred the case back to me for two purposes: (1) to clarify my rationale, and (2) to conduct an evidentiary hearing. *See* Judge Daniel's Order of 6-8-00 at 10.

Grynberg has designated himself as an expert in this case, and defendants have filed a motion to strike him as an expert. Grynberg's qualifications to serve as an expert will be resolved in a separate proceeding or order, and it is not my intention here to resolve that issue. However, the fact that Grynberg claims to be qualified to serve as an expert, and the fact that he asserts this as one part of his basis for seeking relief from the Protective Order, necessarily place Grynberg's qualifications at issue in this present proceeding. To the extent that I comment upon his qualifications as an expert, I do so only within the limited context of the Protective Order.

On May 24, 2000, I conducted a hearing at which time I received testimony from two witnesses: Grynberg, and Dale Vanderwal, Production Manager for defendant Praxair. The purpose of the hearing was to permit Grynberg, in particular, to present additional evidence in support of his claims that (a) the information which Praxair is protecting does not constitute trade secrets, (b) he does not present a threat of competition to Praxair, and (c) he personally must have access to all of the business and technical information in order to coordinate his own experts and the prosecution of his case.

Grynberg does not complain that Praxair has failed to produce its confidential and proprietary business and technical information. He complains that access to the information is limited by my Protective Order to his counsel and experts. However, Grynberg claims that his counsel and experts are

inadequate to the task. He asserts that because of his "unique educational background," he is the only person who possesses the knowledge and education which is necessary to understand the business and technical aspects of this case. Hearing Transcript of May 24, 2000, at 43 ("H.Tr."). He states that he has attempted to find persons who are as knowledgeable as himself, but he claims that the experts whom he contacted were "scared to testify" or were not qualified. Id. at 53 & 54.

Praxair has not resisted disclosure of its confidential information to the plaintiff side of the lawsuit. Instead, it has proceeded on the assumption that the Protective Order would prevent disclosure of the information to Jack Grynberg himself. Praxair argues that if Grynberg is not at this time a competitor with Praxair, he is situated by experience, knowledge and the possession of certain mineral holdings to become one. Praxair is willing for its trade secrets to be received and evaluated by Grynberg's counsel and experts, but is unwilling for someone who is situated competitively to receive the materials. Praxair argues that Grynberg should remain subject to the Protective Order because he has neither established that he is qualified as an expert, nor has he established that his need for the trade secrets outweighs the harm which would be suffered by Praxair in the event that the Protective Order is dissolved or modified.

In order to resist production of the information to Grynberg, Praxair must establish "that the information sought is a trade secret, and demonstrate that its disclosure might be harmful." R & D Business Systems v. Xerox Corporation, 152 F.R.D. 195, 196 (D.Colo. 1993); Centurion Industries, Inc. v. Warren Steurer, 665 F.2d 323, 325 (10th Cir. 1981). Once Praxair establishes that the information sought is trade secret information, or otherwise confidential, the burden shifts to Grynberg. He must establish "that disclosure of the trade secrets is both relevant and necessary." R & D Business

Systems, 152 F.R.D. at 197. Additionally, he must prove more than mere interest in the materials, and must show instead that he has a "substantial need for the information." Id. Finally, "the district court must balance the need for the trade secrets against the claim of injury resulting from disclosure." Centurion Industries, 665 F.2d at 325.

In Colorado, "'trade secret" is defined as commercial information relating to business which is secret and of value, and which the owner has treated confidentially. Id. *See also* C.R.S. 1986, § 7-74-102(4) and 1 8-4-408(2)(d). Grynberg argues that Praxair has no secrets to protect here because its own expert, Howard J. Herzog, stated in his report that "'the Walden plant employs processes that are well-known and frequently employed in the design of chemical plants that are entirely appropriate for the purification of carbon dioxide gas streams.'" Grynberg Memo. Brief Regarding Reconsideration at 7, quoting Howard Herzog report. Grynberg concludes, "the technology is well established and well known, not new or secret, and thus does not warrant the extreme, unusual and burdensome measure of an order that keeps such information from the complaining party in the case." Id.

Praxair admits that it uses certain technologies which are generally known in the CO_2 industry. However, Praxair's Production Manager, Mr. Vanderwal, states that it is the particular manner in which the technologies are employed by Praxair which renders them secret. Mr. Vanderwal stated, "Well, we don't want to share because of the - the design of the plant, the temperatures, pressures, the velocity through these vessels, and all the technical criteria that we would run to purify the CO_2." H.Tr. at 103. Outside of the presence of Mr. Grynwald, Mr. Vanderwal related several specific items which Praxair utilizes in its production of CO_2 gas for edible purposes and which Praxair seeks to protect as secret. See Id. at 111, Mr. Vanderwal stated that development of the processes at the

Walden plant required more than a year of trial and error efforts. Id. at 112.

Mr. Vanderwal testified that none of the major companies in the CO_2 industry shared this type of information. Id. at 105. In circumstances where individuals were permitted to tour the Praxair plant, Praxair sought to protect its trade secrets by requiring the parties to sign "secrecy agreements." Id. at 105.

I find that Vanderwal was credible in his testimony. Based upon his testimony, I find that the information which is at issue in the present dispute over the Protective Order is "trade secret" information.

Praxair asserts that Grynberg should not be allowed access to its trade secrets because Grynberg is either a competitor, or is situated in circumstances whereby he could become one. Grynberg denies that he is either a competitor, or that he has any interest in becoming one. I did not find Mr. Grynberg, or his protestations, to be credible.

As Praxair has noted in a number of its pleadings, this is an unusual qui tam case because Grynberg, as the Relator, is not an insider. He claims to have seen what he considers to be abuses by Praxair in the payment of royalties to the United States, and he claims that this lawsuit was initiated to correct those abuses. Because he is not an insider, Mr. Grynberg is apparently motivated in this case either by patriotic loyalty to the United States, or by a desire to make money. I see no evidence of patriotic fervor, and I conclude that his primary interest in bringing this action is money.

In his Complaint, Grynberg stated that he was an experienced "natural CO_2 gas producer," that he had "19 years of experience in the natural CO_2 gas industry," and that

Praxair's practice injured him as a competitor in the CO_2 gas industry, Compl. at ¶ 4, 6 & 9. In his testimony before me on May 24th, Grynberg spent the bulk of his testimony attempting to distance himself from any claims he may previously have made with regard to his experience and/or involvement in the CO_2 industry, adamantly proclaiming that he is not a competitor with Praxair.

I find from the totality of Grynberg's testimony that Praxair is warranted in its concerns with regard to Grynberg's desires for access to its trade secrets. I find that Grynberg has explored for CO_2 in the past, that he presently has interests in the McElmo Dome, which includes CO_2 production, and that he presently administers his family's holdings, which include holdings in companies which produce CO_2 gas. I am not persuaded by Grynberg's efforts to distance himself from involvement with CO_2 as a commodity which can yield profits for him in some form.

Grynberg can obtain profits from this case in two ways. One, he may win this case, and thereby obtain the percentage of the award to which he will be entitled as a qui tam relator. Two if he loses this case, he can use the information which he has obtained from it to attempt to gain some competitive advantage, either by setting himself up in the CO_2 industry, or perhaps by entering into a joint venture with others for the same purpose. I conclude from Grynberg's testimony, and from his manner and demeanor, that if he were to lose this case, and fail to gain the profit which lies in that direction, he would likely seek to gain some advantage, some monetary advantage, from learning the secrets to Praxair.

Having found that the information to which Grynberg seeks access is trade secret information, and having found that Grynberg himself is seeking the information, in part, to gain a competitive advantage, the burden shifts to Grynberg to

demonstrate that he has a substantial need for the information which outweighs Praxair's needs to exclude him from access. During the hearing of May 24, 2000, Grynherg argued that his need for access to the information is motivated by two facts: one, the fact that he is uniquely qualified by education and experience both to act as an expert in this case, as well as to coordinate the efforts of the other experts which he has designated, and, two, the fact that the experts he solicited are either unqualified or are afraid to testify. See H.Tr. at 49-53. Mr. Grynberg has not persuaded me with regard to either of these propositions.

Although Grynberg makes a number of broad and conclusory statements throughout his testimony with regard to his involvement in .the CO_2 industry over the past 20 years, he has provided no facts which reflect that he has any specific, technical knowledge about the processing of CO_2 gas. He had no such speciality in college, and even if he had, he received his degrees almost 50 years ago. He has published no papers on the processing of CO_2 gas. He has never worked in the CO_2 gas production industry, and he has "no experience in processing or purifying carbon dioxide gas." Id. at 84. At best, his testimony reflects that his knowledge of the CO_2 gas production industry is limited to three tours of factories other than Praxair. Id. at 40. In the context of this proceeding, Greenberg has not presented evidence which persuades me either that he is qualified to act as an expert, or that he is "uniquely qualified" such that he is the only person who can coordinate the prosecution of this case.

In addition to himself, Grynberg has designated 5 other individuals whom he claims are qualified to testify as experts in this case. The expert reports and the qualifications of those individuals are the subjects of motions to strike which have been filed by the defendants. However, Grynberg has failed to demonstrate that any one of the other five experts are not

qualified to oversee and coordinate the technical aspects of the case.

Grynberg states that he has looked for experts to testify, but, apparently overlooking the fact that he has designated five other persons as experts, he asserts that any experts "that may have come close, were scared to testify against [Praxair]." Id. at 53, I find this assertion by Grynberg to be incredible. When pressed, Grynberg indicated that he had talked to only one person who was allegedly qualified, and who, he claimed, expressed some fear of testifying, a person named Lou Phennsteil. During the hearing, I found Grynberg's claim to be far fetched. Although it forms no basis for my conclusion, I find more believable the information which Praxair learned following the hearing, that Phennsteil declined to get involved in this matter not out of fear of Praxair, but out of fear that Grynberg would try and use him in Grynberg's 78 other False Claims Act cases. Praxair Post-Hearing Brief at 25, n 17.

Grynberg has presented no facts or information which persuades me that he, and he alone, is the only person in the country who can supervise and/or coordinate the technical aspects of this case. Indeed, because I find that Grynberg is not himself qualified as an expert in the processing of CO_2 gas, I find that he personally has no need for the trade secret information which Praxair seeks to maintain as secret as to him. I conclude that Grynberg's stated needs for the information do not outweigh Praxair's needs to exclude him from access.

CONCLUSION

Having considered all of the testimony which was presented before me on May 24, 2000, and having considered all of the numerous briefs which have been submitted on

behalf of both Grynberg as well as the defendants, I find and conclude that Praxair is warranted in its assertion that, if he is granted access to Praxair's trade secrets, Grynberg will seek to gain competitive advantage from the information. I also find and conclude that Grynberg has failed to demonstrate that his needs for the information outweigh Praxair's needs to exclude him from access to it. I stand by my ruling that the Protective Order, as drafted, place.

Dated at Denver, Colorado, this day of: October 3, 2000

BY THE COURT:

O. Edward Schlatter
United States Magistrate Judge

(4)

Supreme Court, U.S.
FILED
JUN 3 - 2005
OFFICE OF THE CLERK

No. 04-1363

In The
Supreme Court of the United States

UNITED STATES OF AMERICA ex rel.
JACK J. GRYNBERG,

Petitioner,

v.

PRAXAIR, INC. and NIELSON & ASSOCIATES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Phillip D. Barber, Esq.
Counsel of Record
1675 Larimer Street,
Ste. 620
Denver, Colorado 80202
(303) 894-0880

Michael S. Porter, Esq.
4465 Kipling Street
Wheat Ridge, CO 80033

Edward A. Dauer, Esq.
2255 East Evans Avenue
Denver, CO 80208

Attorneys for the Petitioner

TABLE OF CONTENTS

I. Corrections to Opposition Briefs' Statement of Facts 1

II. Reply to New Matters Raised in Opposition Briefs. 2

A. New Legal Arguments. 2

1. The FOIA Document 2
2. Public Disclosure 3
3. Based Upon 3
4. Original Source 4
5. Conflicts Among the Circuits 4
6. Lack of Jurisdiction to Award Attorneys' Fees Against Grynberg 5
7. Praxair Did Not Prevail on Any Claim in the Litigation 7

B. New Issues Raised in Opposition Briefs . . 7

1. Were the Royalty Reports "Knowingly" False? 8
2. Does the Pre-1986 Government Knowledge Bar Apply to Post-1986 False Statements? 9
3. Was the Disclosure to Nucor a Public Disclosure? 10
4. Did Grynberg Fail to File Required Disclosure Statements? 10

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Branson v. Nott,
62 F.3d 287 (9th Cir.),
cert. denied, 516 U.S. 1009 (1995) 5

Citizens for a Better Env't v. Steel Co.,
230 F.3d 923 (7th Cir. 2000) 6

Horner v. Kentucky H. Sch. Ath. Ass'n,
206 F.3d 685 (6th Cir. 2000) 7

Hughes Aircraft Co. v. United States ex rel. Schumer,
520 U.S. 939 (1997) 9

Shaw v. AAA Engineering and Drafting, Inc.,
213 F.3d 519 (10th Cir. 2000) 8

Texas State Teacher's Ass'n v. Garland Ind. Sch. Dist.,
489 U.S. 782 (1989) 6

United States ex rel. Ervin & Associates, Inc. v. The Hamilton Securities Group, Inc.,
332 F. Supp. 2d 1(D. D.C. 2003) 3

United States ex rel. Fine v. Advanced Sciences, Inc.,
99 F.3d 1000 (10th Cir. 1996) 6

United States ex rel. Fine v. MK-Ferguson Co.,
99 F. 3d 1538 (10th Cir 1996) 10

United States ex rel. Grynberg v. Praxair, Inc.,
207 F.Supp.2d 1163 (D.Colo. 2001),
aff'd in part, rev'd in part, 389 F.3d 1038 (10th Cir. 2004) ..... *passim*

United States ex rel. Kreindler & Kreindler v. United Technologies Corp.,
985 F.2d 1148 (2nd Cir. 1993) 9

United States ex rel. Mayman v. Martin Marietta Corp.,
894 F.Supp. 218 (D.Md. 1995) 9

United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.,
190 F.3d 963 (9th Cir. 1999) 9

United States ex rel. Springfield Terminal Ry. v. Quinn,
14 F. 3d 645 (D.C. Cir. 1994) 2

United States v. Kates,
419 F.Supp. 846 (E.D.Pa. 1976) 9

United States v. Mack,
2000 U.S.Dist.LEXIS 17367 (S.D. Tex 2000) 9

Federal Statutes:

31 U.S.C. §3730(b)(1) 7

31 U.S.C. §3730(c) 7

31 U.S.C. §3730(c)(5) 7

31 U.S.C. §3730(d)(4) 6

31 U.S.C. §3730(e)(4) 3, 4, 6, 7

31 U.S.C. §3730(e)(4)(B) 10

42 U.S.C. §11046(f) 6

42 U.S.C. §1988 6

Federal Regulations:

30 C.F.R. §206.151 10

Other Authorities:

C. Sylvia, *The False Claims Act: Fraud Against the Government* (2004) 4

J. Boese, *Civil False Claims and Qui Tam Actions* (2d Ed. Supp. 2004) 8

J. Helmer, *False Claims Act: Whistleblower Litigation* (3d Ed. 2002) 5

Pursuant to Rule 15.6, Petitioner, Jack J. Grynberg ("Grynberg") submits this Joint Reply in Support of his Petition for Writ of Certiorari, which shall reply to the Opposition to Petition for a Writ of Certiorari filed by Praxair, Inc. and to Nielson & Associates, Inc.'s Brief in Opposition to Petition for a Writ of Certiorari (sometimes collectively "Opposition Briefs").

I. Corrections to Opposition Briefs' Statement of Facts.

In both of the Opposition Briefs, the defendants seek to portray the government as having "full knowledge" of the fraud which Grynberg alleged. Praxair Opposition, pp. 1-3, Nielson Opposition, pp. 5-6. However, the declarations of the government witnesses on whom they rely undercut this assertion. For instance, the MMS Chief of Enforcement who supposedly had "full knowledge", stated that approval of the defendants' operations at the McCallum Fields was "based on the available information" which the defendants, themselves, had provided. *United States ex rel. Grynberg v. Praxair, Inc.*, 207 F.Supp.2d 1163, 1171-72 (D.Colo. 2001), *aff'd in part, rev'd in part*, 389 F.3d 1038 (10th Cir. 2004).

Another BLM employee, who was responsible for monitoring the accuracy of Praxair's measurements, stated that the BLM was aware that Praxair's plant was "losing *some* amount of gas" at its facilities, (emphasis added); however, had he known the nature or extent of losses of CO_2 at Praxair's plant, he would have been concerned. While the United States declined to intervene in the case, it stated "Our decision to decline [to intervene] should not be construed as a statement about the merits of the case."

Grynberg's information showed that the government did not have "full knowledge" of what had transpired at Praxair's facilities, and that approvals were gained because of that fact.

II. Reply to New Matters Raised in Opposition Briefs.

A. New Legal Arguments.

1. The FOIA Document. The premise of Praxair's legal analyses[1] is that every element of the fraud was disclosed in the FOIA document. That premise is factually as well as legally incorrect. A "public disclosure" occurs when what is disclosed – exclusively from the sources listed in the statute – is either the fraud itself or all of the elements from which fraud can be inferred. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F. 3d 645, 654 (D.C. Cir. 1994).

Even a casual reading of the FOIA document, which is reproduced as Appendix J to Grynberg's Petition, shows that it disclosed only a facially unexceptionable transaction. Grynberg discovered from other sources the elements necessary to show that the transaction was the source of fraudulent reports. As to the volume claim, the FOIA document described only the fact of tailgate measurement, but not the fact of unauthorized venting nor the fact that the representations about the return line – on which the tailgate measurement "approval" was based – were false. As to the

---

[1] Nielson's legal arguments on this issues are merely disagreements with arguments and conclusions in Grynberg's Petition and thus are not "new matters".

value claim, the FOIA document revealed only that there was a contract price, said nothing about the market value of the CO_2 that was sold to Praxair, nor that the contract price did not include the required "gross-up" for production cost deductions.

2. Public Disclosure. Praxair argues that the Court of Appeals held that the FOIA document *alone* disclosed all the necessary elements of the fraud. Although the opinion speaks for itself, Grynberg would note that the public disclosure discussion begins with "*the public domain* contained all the elemental aspects of the allegedly fraudulent transaction." *Praxair*, 389 F.3d at 1051 (emphasis added). Thus the FOIA document was considered *together with* the extra-statutory sources (such as the information from a state oil and gas commission and a private service). This contribution of sources from the "public domain" is not consistent with the restrictive listing in 31 U.S.C. §3730(e)(4).

3. Based Upon. Praxair argues that the Court of Appeals looked at *only* the FOIA disclosure in assessing the information on which Grynberg's action was "based." The Tenth Circuit did indeed include in its "based upon" analysis material from "the public domain", and not just material from the statutory sources. For example, the Tenth Circuit's holding describes as essential facts both the "venting of gas" and the comparison of contract prices with market prices. Even under the capacious reading of the Tenth Circuit, neither of those facts were even suggested by the FOIA document (which does not identify a market price and which said "[t]he remaining gas will be compressed and reinjected into the Dakota-Lakota zone.") *Id.* at 1052. *See, e.g., United States ex rel. Ervin & Associates, Inc. v.*

The Hamilton Securities Group, Inc., 332 F. Supp. 2d 1, 9 n.5 (D. D.C. 2003): "To the extent that [a relator] may have relied on facially innocuous documents obtained under FOIA, such 'disclosures' do not necessarily bar *qui tam* jurisdiction."

4. Original Source. Most of Praxair's argument with regard to the original source issues is merely a disagreement with the arguments and conclusions in Grynberg's Petition. As such, they are not "new matters," and Grynberg respectfully refers the Court to the Petition for his reply.

5. Conflicts Among the Circuits. Nielson's legal argument rests on the categorically false proposition that there are no conflicts between the Circuits of which this Court should take notice, explaining the variability among decisions as only "a perception of how the statute is applied in differing factual situations." Nielson Opposition, p. 13. As the opinions cited in Grynberg's Petition show, however, the Circuits themselves announce the conflicts when dealing with questions of first impression under the FCA, most particularly the provisions of 31 U.S.C. §3730(e)(4) which dominate in this case. All of the major commentators have said the same, namely, that divisions among the Circuits are rife in the cases interpreting the portions of the FCA which are at issue here.[2]

2

". . . the case law has become a complex and tangled web of doctrine . . . careful attention to the cases *in the circuit in which a case is brought* is essential." C. Sylvia, *The False Claims Act: Fraud Against the Government* (2004) at 639 (emphasis added).

(continued...)

6. Lack of Jurisdiction to Award Attorneys' Fees Against Grynberg. In his Petition, Grynberg provided a host of authority which hold that if a district court lacked subject matter jurisdiction over a "claim in the first instance, it also lacked the power to award attorney's fees." Petition, p. 25, quoting *Branson v. Nott*, 62 F.3d 287 at 292-293 (9th Cir.), *cert. denied*, 516 U.S. 1009 (1995), and other cited cases. Praxair provides no authority to the contrary. Instead, it attempts to dodge these holdings by advancing spurious arguments.

Praxair's contention that there is a "total lack of conflicting decisions" on the attorneys' fee issue is dubious. Praxair Opposition, p. 23. The Tenth Circuit, itself, recognized that there was a split of authority between the Ninth, Eighth and Second Circuits, on the one hand, and the Seventh Circuit on the other hand, as to whether a court which lacks jurisdiction over a case may nonetheless award attorneys fees. *See Praxair,* 389 F.3d at 1055-1058. It adopted the minority approach taken by the Seventh

---

[2](...continued)
"Courts follow two diverging paths in determining " the meaning of "based upon" in §3730(e)(4), *Id.* at 666. As to the original source issue, "courts have divided on what information, and how much information, must be direct and independent . . ." *Id.* at 673. "There are at least three distinct approaches to 'public disclosure' and four distinct analyses to 'original source' on the parts of Courts of Appeal." J. Helmer, *False Claims Act: Whistleblower Litigation* (3d Ed. 2002) at 235. "The 'original source' rule has become (along with 'public disclosure') the most litigated -- and confused -- issue under the *qui tam* provisions." Boese, Op. Cit. at 4-89.

Circuit. *Id.*, citing *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000).

Praxair next floats the argument that "the conflict [between Circuits] that Grynberg alleges would exist only if §3730(d)(4) was analogous to the fee provisions in 42 U.S.C. §1988 and the IDEA, an erroneous proposition that Grynberg never even asserts." Praxair Opposition, p. 20. This criticism is torpedoed by the simple fact that it was the Tenth Circuit that found those statutes analogous:

> The FCA does not define the terms 'clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment,' but the Act's legislative history suggests that the standard of section 3730(d)(4) is analogous to that used for claims for attorneys fees brought under 42 U.S.C. §1988.

Praxair, 389 F.3d at 1055, citing *Texas State Teacher's Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). *See also, Praxair*, 389 F.3d at 1056, n. 18 comparing the FCA attorneys' fee provision by analogy to 42 U.S.C. §11046(f).

Finally, it is duplicitous for Praxair to argue that "describing §3730(e)(4) as 'jurisdictional' is somewhat of a misnomer . . .", Praxair Opposition, p. 22, when the Tenth Circuit repeatedly stated that, "[s]atisfaction of the provisions of 31 U.S.C. §3730(e)(4) is a question of *subject matter jurisdiction,*" and labeled §3730(e)(4) as a "jurisdictional bar". *Praxair*, 389 F.3d at 1048, 1050 (emphasis added), quoting *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1003 (10th Cir.

1996). In both the appellate and lower courts, Praxair repeatedly urged that §3730(e)(4) was "jurisdictional" in order to justify dismissal of Grynberg's case.

7. Praxair Did Not Prevail on Any Claim in the Litigation. In an FCA case the real party in interest is the United States of America. *See* 31 U.S.C. §3730(b)(1), (c) (relator's action brought "in the name of the Government", and only the Government may settle or dismiss the case). When an FCA case is dismissed for lack of subject matter jurisdiction, the defendant does not "prevail" because a party can only prevail upon a claim if it receives "at least some relief on the merits of [its] claim . . ." *Horner v. Kentucky H. Sch. Ath. Ass'n*, 206 F.3d 685, 698 (6th Cir. 2000). There has been no ruling on the merits of Grynberg's FCA claims.

The United States remains free to file an action to pursue the identical claims that Grynberg tried to assert. *See* 31 U.S.C. §3730(c)(5) ("Government may elect to pursue its claim through any alternative remedy available to the Government"). Neither Praxair nor Nielson would be able to argue that the disposition of Grynberg's action affects the ability of the United States to file an action based on the same claims.

B. New Issues Raised in Opposition Briefs.

One or both of the Opposition Briefs argue that Grynberg's claims fail on four questions other than those presented in the Petition, making review of this case inappropriate. Each of the arguments is substantively incorrect and all of them are irrelevant. The Tenth Circuit decided the case on jurisdictional grounds, expressly

declining to consider any of the additional questions which Praxair and Nielson have raised. *Praxair*, 389 F.3d at 1042, 1049 n.14, 1054 n.16. If the writ is granted and the Court of Appeals' decision is reversed, presumably the case will be remanded for further proceedings, including these additional questions. The substantive merits of each of the four additional grounds is discussed below.

1. Were the Royalty Reports "Knowingly" False? Nielson's Counterstatement of the Facts and Praxair's Other Reasons for Denying the Writ incorrectly assert that, because their measurement practices were "known and approved of," their royalty reports could not have been "knowingly" false. However, government knowledge and even government approval do not preclude a finding that false statements are "knowingly" false.

Congress amended the FCA in 1986 partly because it found that fraud was frequently perpetrated on the government even when the agency was provided with most of the relevant facts.[3] The amendments were designed to encourage private relators to pursue such frauds which the government had not unraveled. Thus, in 1986 Congress removed the former "government knowledge," defense.[4]

---

[3] J. Boese, *Civil False Claims and Qui Tam Actions* (2d Ed. Supp. 2004) at 1-20, recounting Congressional "alarm and impatience over what was perceived as rampant fraud and government acquiescence."

[4] *See* discussion in *Shaw v. AAA Engineering and Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000).

Some cases do hold that government knowledge of a deviation from *contract* specifications counters the claim that the invoices were "knowingly" false. All such cases, however, involve *contracts*. *See, e.g. United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1156 (2nd Cir. 1993). That exception has no application where, as here, falsity lies in the knowing violation of a *regulation*. Defendants, for example, at the very least knew that the royalty statements did not reflect the market price and did not "gross up" the sale price to include the value added to the carbon dioxide by Praxair.[5] No government agent can modify, expressly or by acquiescence, such regulatory requirements. *See, United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F.Supp. 218, 223 (D.Md. 1995); *United States v. Kates*, 419 F.Supp. 846 (E.D.Pa. 1976); *United States v. Mack*, 2000 U.S.Dist.LEXIS 17367 (S.D. Tex 2000). Moreover, the government's knowledge and supposed acquiescence is at most a disputed matter to be considered on remand.

2. Does the Pre-1986 Government Knowledge Bar Apply to Post-1986 False Statements? Praxair asserts that because the government knew of its reporting practices before 1986, the pre-1986 government knowledge defense precludes Grynberg's action based on those practices after 1986. In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 952 (1997), this Court held that the 1986 amendments to the FCA would not be applied retroactively. *See also, United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999) (holding that the pre-1986 bar applies only to statements made before 1986). The false statements

---

[5] 30 C.F.R. §206.151, defining "gross proceeds".

Grynberg alleges in this case were all made in 1988 or later.

3. Was the Disclosure to Nucor a Public Disclosure? Nielson argues that jurisdiction does not exist because of discussions held in Nucor's presence during a meeting between the defendants and the MMS. A disclosure is not a "public disclosure" unless it is made to a "stranger to the fraud" who has no disincentive to make the information public. *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F. 3d 1538, 1545-46 (10th Cir. 1996). Nucor was a co-owner of the leases with Nielson, with its own obligation to report the royalties correctly. *See* 30 C.F.R. §206.151 (2001) (definition of "lessee".) It is at most a triable issue of fact whether Nucor was a stranger to the fraud.

4. Did Grynberg Fail to File Required Disclosure Statements? The Opposition Briefs argue that Grynberg cannot be a proper relator because he did not submit the pre-filing information required of an "original source" under 31 U.S.C. §3730(e)(4)(B). Again, this was a question that the Court of Appeals explicitly decided *not* to address. *Praxair,* 389 F.3d at 1054, n.16.

CONCLUSION

In order to answer fundamental questions about actions which private citizens may bring under the FCA, and to resolve serious divisions among the Circuits on those issues, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PHILLIP D. BARBER, P.C.

Phillip D. Barber
1675 Larimer Street, Ste. 620
Denver, Colorado 80202
303-894-0880

Edward A. Dauer, Esq.
2255 East Evans Avenue
Denver, CO 80208

Michael S. Porter, Esq.
4465 Kipling Street
Wheat Ridge, CO 80033

Attorneys for the Petitioner